CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 671

V. K. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA, PETITIONER,

vs.

STATE OF NEBRASKA, EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED JANUARY 4, 1941.

CERTIORARI GRANTED MARCH 3, 1941.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

V. B. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA, PETITIONER,

vs.

STATE OF NEBRASKA EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

INDEX.

	Original	Print
Proceedings in Supreme Court of Nebraska	1	1
Petition	3	1
Answer (omitted in printing)	8	
Motion for judgment on pleadings	12	4
Amended answer	14	4
Petition in intervention	18	6
Stipulation re issue involved, etc.	22	7
Order of submission	23	8
Judgment	24	8
Opinion Messmore, J.	26	9
Dissenting opinion, Johnsen, J.	38	19
Motion for rehearing (omitted in printing)	43	
Order denying motion for rehearing	44	22
Praecipe for record	46	23
Certificate (omitted in printing)	47	
Stipulation re printing of record	48	23
Order allowing certiorari		24

BLANK PAGE

[fols. 1-2] [Caption omitted]

[fol. 3] **IN THE SUPREME COURT OF NEBRASKA**

STATE ex Rel. THE WESTERN REFERENCE & BOND ASSOCIATION, INC., Relator,

vs.

V. B. KINNEY, Secretary of Labor of the State of Nebraska, Respondent

PETITION IN MANDAMUS—Filed May 21, 1940

Comes now the Relator and for cause of action against the Respondent alleges:

I

That relator is, and was at all times herein mentioned, a corporation, duly organized and existing under and by virtue of the laws of the State of Nebraska, with its principal place of business in the City of Omaha, Nebraska; that Relator is now, and was at all times herein mentioned, a private employment agency as defined by Section 48-501, Compiled Statutes of Nebraska 1929, and has operated and carried on business as a private employment agency in [fol. 4] Omaha, Nebraska, for more than 30 years last past.

II

That Respondent is now, and was at all times herein mentioned, the duly appointed, qualified, and acting Secretary of Labor of the State of Nebraska, charged with the duty of issuing licenses to private employment agencies in the manner prescribed by the Statutes of the State of Nebraska in such cases made and provided.

III

That Relator duly made, executed and filed with Respondent its application for a license, for the year commencing May 1, 1940, to maintain a private employment agency; that Relator duly executed, submitted and filed with Respondent a surety bond in the penal sum of $2,000.00 conditioned as required by law; that your Relator duly tendered to and deposited with Respondent $50.00 in payment of the license

fee in advance for the year commencing the 1st day of May, 1940.

IV

That the filing of the application and the bond aforesaid and the deposit of $50.00 aforesaid with respondent constituted performance by the Relator of all conditions on its part to be performed precedent to the issuance to it of the license aforesaid; that notwithstanding the performance by Relator of all provisions of the law on its part to be performed the Respondent nevertheless has refused and does now refuse to issue to Relator a license to operate and maintain a private employment agency.

V

That it is the plain duty of the Respondent, enjoined upon him by law, to issue said license to the Relator; that said duty requires no exercise of discretion or judgment upon the part of Respondent; that the act required of the Respondent in the issuance of said license is not a judicial act but is a ministerial act only; that by the Respondent's refusal to issue said license to Relator the Respondent has [fol. 5] wilfully failed and refused to perform an act required of him by the Statutes of Nebraska in such cases made and provided, and Respondent has clearly committed an abuse of such discretion as may be in him vested in the premises.

VI

That Respondent has refused and does now refuse to issue to Relator the license aforesaid for the sole reasons that Relator, for many years last past and to the knowledge of Respondent and his predecessors in office, has refused to charge and has refused to agree to charge for its services an amount which, together with the registration fee of $2.00, shall in no case exceed ten per cent (10%) of all moneys paid to or to be earned by the applicant for the first month's service growing out of employment furnished by the Relator, as provided and prescribed by Section 48-508, Compiled Statutes of Nebraska 1929; and in that connection Relator alleges that said Statute, being Section 48-508 of Compiled Statutes of Nebraska 1929, insofar as it limits the fees, compensation and reward of Relator to an

amount which, together with a registration fee of $2.00, shall not exceed ten per cent (10%) of all moneys paid to or to be paid or earned by the applicant for the first month's service growing out of employment furnished by Relator, and insofar as said Section fixes or prescribes the maximum compensation, fees, and charges of Relator in conducting a private employment agency is not in fact a law and cannot be enforced, but said pretended Statute is unconstitutional and void, and of no force and effect for the reason that it deprives Relator of his liberty and property without due process of law in contravention and violation of the Constitution of the State of Nebraska wherein it is provided in Article I, Section 3 thereof that no person shall be deprived of life, liberty or property without due process of law, and in contravention and violation of the Constitution of the United States wherein it is provided in the Fourteenth Amendment, Section 1 thereof, that no [fols. 6-11] state shall deprive any person of life, liberty or property without due process of law.

VII

That Relator has no adequate remedy save through the proceedings herein.

VIII

That by reason of the refusal of the Respondent to execute and issue to Relator a license to operate and maintain a private employment agency for the year commencing May 1, 1940, Relator is entitled to a peremptory writ of mandamus compelling the Respondent to issue to Relator the license aforesaid.

Wherefore, Relator prays that a peremptory writ of mandamus issue in this cause ordering the Respondent forthwith to execute and issue to the Relator the license hereinabove described.

Tunison & Joyner, Attorneys for Relator.

Duly sworn to by Harry Knapp. Jurat omitted in printing.

[File endorsement omitted.]

[fols. 12-13] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed May 27, 1940

Comes now Relator, Respondent having heretofore filed his answer herein, and respectfully moves the Court that judgment be entered herein upon the pleadings in favor of Relator and against Respondent.

Tunison & Joyner, Attorneys for Relator.

[File endorsement omitted.]

[fol. 14] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

AMENDED ANSWER—Filed May 28, 1940

Respondent for his amended answer to Petition of Relator:

I

Admits the allegations of paragraphs I, II, and III.

II

Alleges that Respondent has refused to issue a license to Relator for the reason that Relator for a number of years last past has violated the provisions of Section 48-508, Compiled Statutes of Nebraska, 1929, relating to fees by charging fees in excess of ten per cent of the first month's salary or wages, rather than a sum not to exceed ten per cent of the first month's wages or salary, as limited by said statute; and that Respondent advised Relator, through its officers and agents, that it, the Relator, would have to comply with the provisions of said law; and that Relator, through its officers and agents, stated and threatened that it would continue to violate said provisions when and if granted a license for the year commencing May 1, 1940; that Respondent refused and still refuses to grant a license to Relator because of the threat of continued and repeated violations

of said statutory provision, the enforcement of which is a duty enjoined upon the Respondent by Section 48-512, Compiled Statutes of Nebraska, 1929.

III

Alleges that the Respondent's reason for refusing to issue said license to the Relator is a valid justification for [fol. 15] refusing to act in the premises.

IV

Alleges that the business of a private employment agency is vitally affected with a public interest, and that the legislature may in the exercise of the police power, for the promotion of the general welfare of the people of the state, regulate the maximum fees to be exacted from an employee applicant.

V

Denies that any part of Section 48-508, Compiled Statutes of Nebraska, 1929, is in derrogation of any rights, privileges or immunities guaranteed by the constitutions of the State of Nebraska or of the United States.

VI

Denies paragraphs IV, V, VI and VIII, except those portions of said paragraphs heretofore admitted.

Wherefore, Respondent prays that Relator's petition be dismissed and that Respondent go hence without day and that the costs of this action be taxed to the Relator.

V. B. Kinney, Respondent.

Duly sworn to by V. B. Kinney. Jurat omitted in printing.

[fols. 16-17] [File endorsement omitted.]

[fol. 18] IN THE SUPREME COURT OF NEBRASKA

STATE, EX REL, THE WESTERN REFERENCE & BOND ASSOCIATION, INC., Relator

v.

V. B. KINNEY, Secretary of Labor of the State of Nebraska, Respondent

MILLS TEACHERS AGENCY, THOMAS EMPLOYMENT SERVICE, Co-Operative Reference Company, Marti Reference Company, Watts Reference Company, Cornhusker Teachers Bureau, Grace Boomer, Davis School Service, Interveners.

PETITION OF INTERVENTION—Filed May 28, 1940

Come now the above named Interveners and each of them and for cause of action against the Respondent allege:

I

Interveners have an interest in the matter in litigation in the above entitled cause, and in the success of the Relator in said action, and do hereby intervene in the above entitled cause under the authority of and pursuant to Section 20-328, Compiled Statutes of Nebraska, 1929.

II

Each of the above named Interveners is a private employment agency as defined by Section 48-501, Compiled Statutes of Nebraska, 1929, and is now carrying on and maintaining the business of a private employment agency in the State of Nebraska. Interveners confine their business, as does the Relator, to soliciting and securing positions for clerical, executive, technical and professional [fol. 19] workers, and do not engage in the business of securing placements for common laborers, domestic servants or other classes of unskilled workers.

III

Interveners hereby adopt and incorporate herein by reference to Relator's petition the allegations contained in paragraph VI thereof that Section 48-508, Compiled Statutes of Nebraska, 1929, insofar as it limits the compensation

and fees of employment agencies to an amount which together with a registration fee of $2.00, shall not exceed ten per cent (10%) of all moneys paid to or to be paid or earned by the applicant for the first month's service growing out of employment furnished by the employment agency, and insofar as said section fixes or prescribes the maximum compensation and fees which Interveners, as private employment agencies, may charge is not in fact a law, but is unconstitutional and void for the reason that it deprives Interveners of their property without due process of law in contravention of the due process clause in Article I, Section 3 of the Nebraska Constitution and Section I of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Interveners pray, as does Relator, that those portions of Section 48-508, Compiled Statutes of Nebraska, 1929, which attempt to limit the fees, compensation and reward of Interveners to an amount which shall not exceed ten per cent (10%) of all moneys paid to or to be paid or earned by the applicant for the first month's service growing out of employment furnished by Interveners, be declared void and of no force and effect.

Tunison & Joyner, Attorneys for Interveners.

Duly sworn to by Fay M. Watts. Jurat omitted in printing.

[fols. 20-21] [File endorsement omitted.]

[fol. 22] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

STIPULATION—Filed May 28, 1940

Come now relator and respondent, by their respective attorneys, and hereby agree and stipulate that the sole and only issue for determination in the above entitled cause is the constitutionality of Section 48-508, Compiled Statutes of Nebraska for 1929, in so far as the same fixes or limits the fees or compensation of private employment agencies.

It is further agreed and stipulated that the amended answer of the respondent heretofore filed shall stand and con-

stitute an answer to the petition of intervention filed on the 28th day of May, 1940.

Tunison & Joyner, Attorneys for Relator and Interveners. Walter R. Johnson, Attorney General. By Don Kelley, Assistant Attorney General, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF NEBRASKA

MINUTE ENTRY—Filed June 6, 1940

The following causes were argued by counsel and submitted to the Court:

* * * * * * *

No. 3102. State ex rel. Western Reference & Bond Assn. v. Kinney, Original.

* * * * * * *

Robert G. Simmons, Chief Justice.

[fols. 24-25] IN SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, EX REL, THE WESTERN REFERENCE & BOND ASSOCIATION, INC., Relator,

v.

V. B. KINNEY, Secretary of Labor of the State of Nebraska, Respondent,

MILLS TEACHERS AGENCY, et al., Interveners

JUDGMENT—Filed August 2, 1940

This cause coming on to be heard upon the petition, the answer, the petition in intervention, the amended answer, the motion of relator for judgment on the pleadings, and a stipulation of counsel, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds the issues in favor of the relator and the interveners.

It is, therefore, considered, ordered and adjudged that a peremptory writ of mandamus issue against the respondent commanding him to issue to relator and to the intervenors licenses to operate private employment agencies as defined by Section 48-501, Compiled Statutes of Nebraska for 1929, and that he pay the costs herein incurred, taxed at $; for all of which execution is hereby awarded.

Opinion by Messmore, Judge. Johnsen, Judge dissents.

W. B. Rose, Acting Chief Justice.

[fol. 26] IN SUPREME COURT OF NEBRASKA

[Title omitted]

OPINION—Filed August 2, 1940

1. A motion for judgment on the pleadings admits only facts well pleaded in an answer and does not admit a conclusion of law.

2. Section 9, art. XV of the Nebraska Constitution, provides: The legislature may enact laws "for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare." In the absence of evidence disclosing that the statute is confiscatory, thereby depriving a person of property without due process of law, the presumption is that the factual situation favors the legislature in enacting such law, and that it is not in contravention of section 3, art. I of the Constitution of Nebraska, the due process clause.

3. That part of section 48-508, Comp. St. 1929, objected to, wherein the maximum amount that may be charged by a private employment agency for services rendered is fixed, is unconstitutional in that it contravenes section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. The power to require a license for and to regulate the conduct of private employment agencies is distinct from the power to fix prices. Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545.

[fol. 27] Heard before Simmons, C. J., Rose, Eberly, Paine, Carter, Messmore and Johnsen, JJ.

MESSMORE, J.:

This is an original action in mandamus. The relator is a private employment agency and seeks to compel the secretary of labor of Nebraska to issue it a license to do business as such. The respondent refused to issue a license because relator refused to comply with section 48-508, Comp. St. 1929, fixing the maximum compensation which an employment agency may collect. The respondent's answer seeks to justify the refusal to issue the license for the reason as above stated, and specifically alleges that the business of a private employment agency is vitally affected with a public interest, and the legislature, in the exercise of its police power, can lawfully regulate the maximum fee. A petition in intervention was filed by eight additional agencies, which allege that they operate on the same basis as the relator. By stipulation, the respondent's answer stands to the petitions in intervention. The relator filed a motion for judgement on the pleadings.

By stipulation, the only issue for determination in the cause is the constitutionality of section 48-508, Comp. St. 1929, in so far as the same fixes or limits the fees or compensation for private employment agencies.

The respondent contends that the motion of relator for judgment on the pleadings has the effect of admitting all material facts in the answer.

A motion for judgment on the pleadings admits, either directly or impliedly, the truth of all well pleaded facts in the pleading of the opposing party. Such a motion is in the nature of a demurrer and raises an issue of law only. Van Etten v. Kosters, 48 Neb. 152, 66 N. W. 1106; Webster v. City of Hastings, 56 Neb. 669, 77 N. W. 127; Abraham v. Studebaker Corporation, 113 Neb. 721, 204 N. W. 786. A motion for judgment on the pleadings does not admit con- [fol. 28] clusions of the pleader. The allegation in respondent's answer,—that the business of a private employment agency in Nebraska is vitally affected with a public interest,—is a conclusion of law. State v. Wurdeman, 311 Mo. 64, 277 S. W. 571; Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U. S. 54, 58 S. Ct. 466.

The pertinent part of the statute here involved is as follows: "No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or

exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent. of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer.'" Comp. St. 1929, sec. 48-508.

Relator concedes that a private employment agency is subject to regulation by the state and may be compelled to pay a license fee for the privilege of conducting such business. Brazee v. Michigan, 241 U. S. 340, 36 S. Ct. 561; Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545. Relator's claim is that the part of the statute above set out, fixing the fees and compensation of an employment agency, is in contravention of section 3, art. I of the Constitution of Nebraska, which reads: "No person shall be deprived of life, liberty, or property, without due process of law."

The respondent cites section 9, art. XV of the Constitution of Nebraska, as follows: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and *for the prevention of unfair business practices and unconscionable* [fol. 29] *gains in any business or vocation affecting the public welfare.* An industrial commission may be created for the purpose of administering such laws, and appeals shall lie to the supreme court from the final orders and judgments of such commission." (Italics ours.)

The respondent's contention is that the language in italics disposes of the relator's challenge, so far as the Nebraska Constitution is concerned; that such provision of the Constitution gives to the legislature authority to enact laws to prevent unfair business practices and unconscionable gains affecting the public welfare.

The language of section 9, art. XV, as above quoted, is clear and comprehensive. In the absence of evidence disclosing that the statute is confiscatory, thereby depriving a person of property without due process of law, the presumption is that on the factual situation the legislature, in enacting section 48-508, Comp. St. 1929, contemplated that such act was in accord with section 9, art. XV of the

Constitution. Under the circumstances, we conclude: That part of section 48-508, Comp. St. 1929, objected to, does not contravene section 3 art. I of the Constitution.

Relator further contends that the issue, as stated, contravenes that part of section 1 of the Fourteenth Amendment to the Constitution of the United States, reading in part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

Our attention is specifically called to the case of Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545, decided May 28, 1928. The New Jersey statute empowered the commissioner of labor to provide a schedule of fees for services to employers seeking employees and persons seeking employment. Discretion with reference to the fees and granting of the license was left to the labor commissioner. All conditions of the statute were conformed to and complied with [fol. 30] except the part with reference to the fees as fixed in the schedule and charged therein. The Ribnik case is analagous to the instant case, except that the statute in Nebraska fixes the maximum charge. The court in Ribnik v. McBride, Supra, held: "The business of an employment agent is not one 'affected with a public interest,'" so as to enable the state to fix charges to be made for the service rendered.

"The power to require a license for, and to regulate the conduct of, a business, is distinct from the power to fix prices." In the opinion it was said (p. 355): "But the question here presented is whether the due process of law clause (of the federal Constitution) is contravened by the legislation attempting to confer upon the Commissioner of Labor power to fix the prices which the employment agent shall charge for his services." And at page 356, quoting from the opinion in Wolff Co. v. Industrial Court, 262 U. S. 522, 537, 43 S. Ct. 630, 27 A. L. R. 1280, it was said: "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation * * * one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

The respondent has cited and analyzed many subsequent decisions to Ribnik v. McBride, supra, in an attempt to disclose that the supreme court of the United States has deviated from such decision, to show a general trend therefrom, emphasizing, among other cases, West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 108 A. L. R. 1330, wherein the case of Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394, was overruled. The language of the court in Adkins v. Children's Hospital, relied on in Ribnik v. Mc-[fol. 31] Bride, supra, appearing on page 356, of that opinion, is as follows:

"In Adkins v. Children's Hospital, 261 U. S. 525, this court had under consideration an act of congress fixing minimum wages for women and children in the District of Columbia. The legislation, so far as it affected women, was held invalid as contravening the due process of law clause of the Fifth Amendment, because it was an arbitrary interference with the right to contract in respect of terms of private employment. It was said (p. 546) that while there was no such thing as absolute freedom of contract, nevertheless, freedom of contract was the general rule and restraint the exception; and that 'the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.'"

The case of West Coast Hotel Co. v. Parrish, supra, upheld the statute of the state of Washington in fixing minimum wages for women and minors, and expressly overruled Adkins v. Children's Hospital, supra. Therefore, it is the respondent's contention, a deathblow was delivered to the Ribnik case. In any event, that case was not expressly overruled in West Coast Hotel Co. v. Parrish, supra.

The respondent also cites Tagg Bros. v. United States, 280 U. S. 420, 50 S. Ct. 220. That case involved the enforcement of regulations prescribed by the secretary of agriculture in fixing the fees which commissionmen could charge the seller for handling stock. We believe this situation to be entirely different. The court pointed out the distinction between Tagg Bros. v. United States and the Ribnik case, stating, in substance, that in the latter the court did not hold that the charge for personal services cannot be regulated. The question decided by the court was whether the services then attempted to be regulated were vested with a

public interest to such extent as to require regulation of the fees an employment agency could charge for services rendered. The Ribnik case held that such business was not affected with a public interest to the extent of requiring the fixing of charges. Tagg Bros. v. United States, supra, does not overrule Ribnik v. McBride.

[fol. 32] The respondent also contends that certain language by Mr. Justice Brandeis in Tagg Bros. v. United States, in fact, nullifies Tyson & Brother v. Banton, 273 U. S. 418, 47 S. Ct. 426, 58 A. L. R. 1236, in so far as such decision is relied upon and cited in Ribnik v. McBride; this on the theory that Mr. Justice Sanford, in concurring in the Ribnik case, did so on the sole authority of Tyson & Brother v. Banton, in that he was unable to distinguish between a labor broker and a theater broker. Respondent implies that the court states: Fixing charges for personal services of brokers is no longer good reason for declaring price-fixing regulations unconstitutional, and respondent reasons that Tagg Bros. v. United States, supra, overruled Ribnik v. McBride by implication.

The holding in Tyson & Brother v. Banton, supra, is set forth in substance in Ribnik v. McBride, as follows (p. 358): "And we since held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.' Tyson & Brother v. Banton, supra, p. 431." The opinion in Ribnik v. McBride also states (p. 355): "And again (p. 438) after reviewing former decisions, it was said that 'each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use.'"

The foregoing language is clear on the issue of price-fixing. Tyson & Brother v. Banton, supra, has not been [fol. 33] overruled by the supreme court of the United States

and still constitutes a cardinal part of the law relied upon in the Ribnik case.

The respondent relies to a great extent on Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, which involved the constitutionality of a New York statute, creating a control board to fix minimum and maximum retail prices to be charged by stores to consumers off the premises where sold. The question presented was whether the federal Constitution prohibited the fixing of the price of milk (held to be food by federal decisions and by the Nebraska supreme court). The court upheld the statute.

The respondent asserts that Ribnik v. McBride, supra, premised the decision on the following: That the fixing of prices for food and clothing, for house rentals or wages to be paid, whether minimum or maximum, is beyond the legislative power. Referring again to Nebbia v. New York, supra, the respondent contends that that case approved the fixing of prices for food, thus dispensing with such reasoning in the Ribnik case. In the Nebbia case the court held: "There is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." (In the instant case there is no contention on the part of the relator that that part of section 48-508, Comp. St. 1929, here objected to, is arbitrary or discriminatory.) In support of its contention in distinguishing the Nebbia case, the relator calls attention to the foregoing language.

To clarify relator's distinction between Ribnik v. McBride and Nebbia v. New York, in the former case, the attempted regulation of the price to be charged by private employment agencies was squarely before the court and held not to be subject to state regulation in such respect. Attention [fol. 34] is further called by respondent to the far-reaching effect of the case of Nebbia v. New York, in that the court gave a new meaning to the phrase, "affected with a public interest," and concluded such formula was without value in determining the power of the state to regulate a business, thus definitely removing the taboo against price-fixing. Establishing the principle of the character of the business does not prevent the state from regulating prices. The

limitation of the test set up by the court is that the legislation must not be arbitrary, discriminatory or demonstrably irrelevant to the policy that the legislature is free to adopt. In the instant case it is true that the relator made no claim that the legislation here objected to on the point at issue was arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt. While the force of this decision is apparent on the issue therein involved, it obviously draws a distinction between a case involving the milk industry and that of a private employment agency. Otherwise, we firmly believe, the supreme court would have overruled Ribnik v. McBride, supra.

Respondent cites the case of Abbye Employment Agency v. Robinson, 166 Misc. 820, 2 N. Y. Supp. (2d) 947, with reference to a legislative act which fixed the gross fees chargeable to applicants for employment in certain enumerated occupations and common labor of the necessitous class, which, in effect, repudiated the holding in Ribnik v. McBride, and possibly cited for the purpose of disclosing the thought of a New York court on the subject. Nevertheless, the decision is not one by a court of last resort of the state of New York, and not the final word on the subject, so far as that state is concerned, and would, therefore, be of no material value in its effect on Ribnik v. McBride, which has not been overruled by the court that rendered the decision.

The respondent cites Sunshine Anthracite Coal Co. v. Adkins, — U. S. —, 60 S. Ct. 907, decided May 20, 1940, in which the Supreme Court of the United States had before it an act providing for the sale and distribution of bituminous coal. [fol. 35] The aim of the act was to stabilize the industry primarily through price-fixing and the elimination of unfair competition. The court upheld the act. The effect was to regulate the business of such coal industry in so far as it affected the mining operator, and fixed and regulated the price of the product and the miner's wages. The regulatory provisions were held to be within the power of congress under the commerce clause of the Constitution. The powers of congress under the commerce clause are restricted by the Fifth Amendment in the same manner as the powers of state legislatures are restricted by the Fourteenth Amendment, so what the court has to say as to the one is generally applicable to both.

Respondent cites the foregoing case and specifically calls our attention to the language cited in the Ribnik case from Wolff Co. v. Industrial Court, supra, as follows: "It has never been supposed, since the adoption of the Constitution, that the business of * * * the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation." Sunshine Anthracite Coal Co. v. Adkins refers directly to mining operators and miners. The distinction between the federal act in the reported cases and the statute under consideration in the instant case is a palpable one and clearly manifested by the provisions of the bituminous coal act, appearing in the opinion, which, if set out, would unnecessarily lengthen this opinion.

We are cognizant of the distinction contended for by respondent in the cases cited and analyzed. The mere fact that certain cases, upon which a decision has been predicated, are either subsequently overruled or the reasoning therein changed or given a new meaning, does not, in fact, overrule such decision. In order to ascertain the full effect and reasoning of a decision, all the language appearing in the opinion to sustain it must be taken into consideration and given equal credence. Cases may be similar and yet not alike. The industries affected by subsequent decisions of [fol. 36] the Supreme Court to Ribnik v. McBride are industries distinctively different from the one affected by the Ribnik decision. Suffice it to say that no decision from a court of last resort, expressing a view contra to that determined in Ribnik v. McBride, has been cited by the respondent.

There is no doubt that the Supreme Court of the United States has, on account of economic conditions that have supervened, recognized that further exercise of the protective power of the state was required and acted accordingly, taking judicial notice of the existence of unemployment and demand for relief, occasioned by an economic depression. That the country has been faced with a distressing economic depression, in which millions of our fellow citizens have been out of employment and unable to secure it, and in many instances only by the grace of the United States government, is too well known to admit of argument or discussion. While for many years employment agencies have been created by many states, civic and labor organizations, to which those unemployed might resort without charge to

them, this field has been vitally enlarged upon by both the federal government and the states, and such other organizations as previously mentioned, to such extent that it is apparent that the business of an employment agency is distinctively one of a highly competitive nature. An attempt to establish a uniform fee for a valuable service and less valuable service, without the expense of overhead, would seem to be hopelessly impracticable, within the limits of constitutional rights.

The relator is engaged in a beneficial business. Constituting part of its property are services rendered in obtaining employment. One is not obligated, nor is it compulsory, to employ relator, and the person seeking to avail himself of such services is at liberty to reject them, if the terms of the contract for compensation are not satisfactory. This right of contract, common to all followers of legitimate vocations, constitutes an asset of the relator and is a part of the property, in the enjoyment of which [fol. 37] relator is guaranteed protection by the Constitution. By that part of section 48-508, Comp. St. 1929, objected to, relator is stripped of the right of contract, deprived of property, circumscribed and hampered in the vocation followed and in the pursuit of livelihood by a provision in an act not applicable in many other occupations.

Speaking of the regulation of the business of relator with reference to fixing prices for services rendered, the relator meets severe competition, and surely such competition is effective in the regulation of fees charged. If the fee be exorbitant or unreasonable, an adequate remedy is provided by law as against the relator and, under the terms of the act, might be very properly exercised.

In view of all argument, the pertinent legal conception is that the Supreme Court of the United States has not expressly overruled the case of Ribnik v. McBride, supra, and our research confirms this fact. The respondent desires that we march on past the decision in the Ribnik case and do the thing that the United States Supreme Court has not seen fit to do. We cannot logically indulge in speculation, however much we may be impressed with masterly dissenting opinions. We conclude that we are bound by the decisions of the Supreme Court of the United States in its interpretation of the federal Constitution.

We make reference to First Trust Co. v. Smith, 134 Neb. 84, 277 N. W. 762, in which this court held: " 'The United States Supreme Court and the Supreme Court of this state are peers. The decisions of the former upon the federal Constitution and laws are binding on the latter; the decisions of the latter upon the Constitution and laws of Nebraska are binding on the former.' Franklin v. Kelley, 2 Neb. 79."

Giving effect to Ribnik v. McBride, supra, that part of section 48-508, Comp. St. 1929, constituting the issue is un- [fol. 38] constitutional in that it contravenes the due process clause of the Constitution of the United States.

The relator's motion for judgment on the pleadings in such respect is sustained.

It is hereby ordered and adjudged that a peremptory writ should issue, commanding the respondent to issue to the relator a license to operate an employment agency for the year commencing May 1, 1940. Judgment accordingly.

DISSENTING OPINION

JOHNSEN, J., dissenting:

I am unable to agree with the majority that Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, is decisive of the present case.

First of all, the statement of Mr. Justice Brandeis, in the unanimous opinion in Tagg Bros. v. United States, 280 U. S. 420, 439, 50 S. Ct. 220, 74 L. Ed. 524, should be noted: "This court did not hold in * * * Ribnik v. McBride that charges for personal services cannot be regulated. The question upon which this court divided * * * was whether the services there sought to be regulated were *then* affected with a public interest." (Italics mine.)

The question to be determined here is not whether in 1928, when the Ribnik case was decided, the employment agency business was sufficiently affected with a public interest to permit the legislature to limit its charges for services, but whether it is so affected at the present time. "It is clear," says Mr. Justice Roberts, speaking for the majority in Nebbia v. New York, 291 U. S. 502, 536, 54 S. Ct. 505, 78 L. Ed. 940, "That there is no closed class or cate-

gory of businesses affected with a public interest * * *." Or, as Mr. Justice Holmes expressed it in the majority opinion in Block v. Hirsh, 256 U. S. 135, 65 L. Ed. 865, 41 S. Ct. 458, "Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of [fol. 39] purely private concern." Mr. Chief Justice Taft gave recognition to the same view, in Wolff Co. v. Industrial Court, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, when he classified, as clothed or affected with a public interest, "Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them."

With me, the conviction is clear that, if the employment agency business did not hold such a peculiar relation to the public as to permit the legislature to limit its charges for services in the prosperous era of a decade and a half ago, the staggering unemployment problem of the past few years has now placed it in that category. This economic condition is, of course, a proper matter for judicial notice. West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703. Today, if not in 1928, the declarations of Mr. Justice Stone, in his dissenting opinion in the Ribnik case, are peculiarly applicable and controlling: "We are judicially aware that the problem of unemployment is of grave public concern; that the conduct of the employment agency business bears an important relationship to that larger problem and affects vitally the lives of great numbers of the population, not only in New Jersey but throughout the United States; that employment agencies, admittedly subject to regulation in other respects, Brazee v. Michigan, 241 U. S. 340, and in fact very generally regulated, deal with a necessitous class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer. * * * There is a public interest at such times in bringing about a prompt readjustment of the labor supply to industry's need for labor. The additional barrier to a quick readjustment created by the agencies' raising of their rates affects that interest adversely.

The establishment of a reasonable maximum rate is well [fol. 40] calculated to obviate the abuse."

To what extent, in the field of price regulation, the Supreme Court of the United States has in fact broadened the principle of the Ribnik case, in the subsequent decisions of Tagg Bros. v. United States, supra. (Commissionmen's fees), Nebbia v. New York, supra, (milk prices), West Coast Hotel Co. v. Parrish, supra, (female minimum wage), and Sunshine Anthracite Coal Co. v. Adkins, — U. S. —, 60 S. Ct. 907, 84 L. Ed. 825, (bituminous coal prices), I deem it unnecessary to discuss. These decisions at least have not moved in the direction toward which the Ribnik case pointed. For present purposes, it is sufficient to say that the vast economic changes that have occurred since the Ribnik case was decided, and the close relationship that employment agencies now bear to the unemployment problem present such differences in conditions that that decision can no longer be regarded as controlling, and we are entitled to make a new examination of the question. In the necessitous and unequal bargaining position in which the unemployed have come to be placed, it is not unconstitutional to close the doors to any possibility of overreaching or "job selling."

The majority opinion is content to rest upon the ground that the Ribnik case has never been expressly overruled. This seems to me too narrow a view of real judicial responsibility. It is not les majesty to question the continued existence of the circumstances and conditions upon which a decision of the Supreme Court of the United States has been predicated, and in such a situation to reexamine the problem that is involved. In some instances this may be the only way in which that court will ever be afforded the opportunity to review its former decision. It was such a reexamination by the Supreme Court of Washington of Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, and a refusal to recognize it is as controlling, that resulted in a review and overruling of it in the subsequent case of West Coast Hotel Co. v. Parrish, supra. Judicial decisions must not become mere copybooks, but they should [fol. 41] always be present admeasurements of the principles and the spirit of the law. Except as to definite and invariable prescriptions and prohibitions of the Constitution, and such limited rules of property as, in the interest of society as a whole, require a permanent crystallization, past

decisions do not establish the finalities of the law, and no sound judicial body will ever deal with them as such. Such decisions necessarily should be employed to measure and test the soundness of judicial thinking, and to safeguard it against transient instability, or the whims of changing personnel, but they obviously can never mark the boundaries to which the thought of the law can extend or its spirit can move.

The majority have properly refused to be guided by the reasoning in the Ribnik case in testing the validity of the statute involved under our state Constitution. They have properly held under that instrument that the employment agency business is one "affecting the public welfare." They have inconsistently refused, however, to recognize it as one "affected with a public interest" under the federal Constitution, because they are unwilling to allow their thoughts in that field to move beyond the boundaries of the Ribnik case. I am unable to stop there. The statute in my opinion is violative of neither the state nor the federal Constitution, and the application for a writ of mandamus ought accordingly to be denied.

The reasonableness of the charge fixed by the legislature in the statute is not raised in this proceeding and so is not involved.

[fols. 42-43] Petition for rehearing covering 10 pages filed September 5, 1940, omitted from this print. It was denied, and nothing more by order October 8, 1940.

[fols. 44-45] In Supreme Court of Nebraska

[Title omitted]

Order Denying Motion for Rehearing—October 8, 1940

This cause coming on to be heard upon motion of respondent for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

Robert G. Simmons, Chief Justice.

[fol. 46] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

PRAECIPE—Filed November 25, 1940

To the Clerk of the Supreme Court:

Please prepare a certified transcript of the record in the above captioned case, with index, including in said record the following: 1: The Petition; 2: The Answer; 3: The Petition of Intervention; 4: The Amended Answer; 5: The Motion for Judgment on the Pleadings; 6: The Stipulation; 7: The Judgment of the Court; 8: The Opinion, including the dissenting opinion of Justice Johnsen; 9: The Motion for Re-hearing; 10: The Order Overruling the Motion for Rehearing; 11: A copy of this Praecipe.

Dated this 25th day of November, 1940.

Walter R. Johnson, Attorney General. By Don Kelley, Assistant Attorney General, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 47] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 48] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated between the parties that the original answer filed by the petitioner in the Court below be eliminated from the printed record to be filed in this Court.

It is further stipulated between the parties that the petition for rehearing in the Court below be eliminated from the printed record which is to be filed in this Court.

[fol. 49] Walter R. Johnson, Attorney General of the State of Nebraska, for Petitioner. Tunison & Joyner, Attorneys for Respondents.

BLANK PAGE

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 3, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 4 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 671

V. B. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA,

Petitioner,

vs.

STATE OF NEBRASKA, EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

WALTER R. JOHNSON,
Attorney General of Nebraska,
DON KELLEY,
Assistant Attorney General of Nebraska,
Counsel for Petitioner.

BLANK PAGE

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Statement of the matter involved	2
Reasons relied on for allowance of the writ	3
Prayer for writ	5
Brief in support of petition for writ of certiorari	7
I. Opinion of the court below	7
II. Jurisdiction	8
III. Statement of the case	9
IV. Specification of errors	9
V. Argument	9
Summary of argument	9
Point A. Conflict with current decisions	10
Point B. Statute valid under recent decisions	14
Conclusion	15

Table of Cases Cited.

Nebbia v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940	4, 12
O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251	4, 14
Ribnik v. *McBride*, 277 U. S. 350, 48 S. Ct. 545	3, 10
State v. *Kinney*, 138 Neb. 574, 293 N. W. 393	7, 12, 14
State Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177	14
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 855	4, 14
Tagg Bros. v. *United States*, 280 U. S. 420, 50 S. Ct. 220, 74 L. Ed. 524	4, 14
Townsend v. *Yeomans*, 301 U. S. 441	4, 14
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703	4, 13

Table of Statutes Cited.

Laws of Nebraska, 1921, Chapter 189, pages 701, 704 (Sec. 48-508, Compiled Statutes of Nebraska, 1929)	2
Judicial Code, Section 237, as amended (45 Stat. 54; U. S. C. A., Title 28, Sec. 344 (b)	8

A.

Statement of Matter Involved.

An original action in mandamus was filed in the Supreme Court of Nebraska by the State of Nebraska on the relation of Western Reference & Bond Association, Inc. (R. 1) (hereafter referred to as "the agency"), to compel V. B. Kinney, Secretary of Labor, petitioner herein, to issue to said agency a license to conduct a private employment agency.

In his amended answer (R. 4), the petitioner alleged that he had refused to issue the agency a license because of past violations and the threat of continued future violations of the private employment agency law with respect to the fees lawfully chargeable to applicants for employment.[1] The relevant part of said statute provides:

> "No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact any other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer.' "

The agency in its petition claimed its refusal to comply with the foregoing was justified by the fact that said provision was void (R. 2-3), being in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 3, Article I, of the Constitution

---

[1] Laws of Nebraska, 1921, Chapter 189, pages 701, 704 (Sec. 48-508, Compiled Statutes of Nebraska, 1929).

of the State of Nebraska, in that said provision deprived it of property without due process of law.

The matter was submitted to the Supreme Court of Nebraska on a motion for judgment on the pleadings (R. 4). In order that the issue would be limited, the parties stipulated (R. 7):

> "* * * that the sole and only issue for determination in the above entitled cause is the constitutionality of Section 48-508, Compiled Statutes of Nebraska for 1929, in so far as the same fixes or limits the fees or compensation of private employment agencies."

The court entered judgment on August 2, 1940, granting a peremptory writ of mandamus (R. 8).

A motion for rehearing (R. 22), after being entertained and considered, was overruled on October 8, 1940 (R. 22).

Mills Teachers Agency, Thomas Employment Service, Co-Operative Reference Company, Marti Reference Company, Watts Reference Company, Cornhusker Teachers Bureau, Grace Boomer, and Davis School Service filed a petition of intervention (R. 6) joining in the attack on the constitutionality of the price limiting provision of the law. All of said intervenors are joined as respondents herein.

B.

Reasons Relied on for Allowance of Writ.

The Nebraska Supreme Court granted the peremptory writ of mandamus solely because, in its opinion, the price limiting provision was in contravention of the due process clause of the Federal Constitution (R. 18-19). The Nebraska court held that the law when tested by the Nebraska Constitution (R. 11-12) was valid.

The Nebraska Court considered itself bound to follow *Ribnik* v. *McBride*, 277 U. S. 350, 48 S. Ct. 545. (Holding

a New Jersey statute, which gave the labor commissioner authority to fix fees of private employment agencies, unconstitutional on the ground that the business was not sufficiently affected with a public interest.) The petitioner endeavored to point out to the Supreme Court of Nebraska that the principles enunciated in that decision had been overruled by subsequent decisions of this Court. However, the Court in its opinion (R. 18) concluded:

> "In view of all argument, the pertinent legal conception is that the Supreme Court of the United States has not expressly overruled the case of Ribnik *v.* McBride, *supra*, and our research confirms this fact. • • • We conclude that we are bound by the decisions of the Supreme Court of the United States in its interpretation of the Federal Constitution."

The question presented is whether the State of Nebraska may, under the police power, establish a reasonable maximum rate of compensation chargeable by a private employment agency, or is the power to regulate by price control as distinguished from the power to regulate by other methods, *ipso facto* repugnant to the due process clause of the Federal Constitution.

The decision of the Supreme Court of Nebraska is not in accord with applicable decisions of this Court. It is in conflict with the doctrines and principles of this Court as announced in *Tagg Bros.* v. *United States*, 280 U. S. 420, 50 S. Ct. 220, 74 L. Ed. 524; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703; *Townsend* v. *Yeomans*, 301 U. S. 441; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 825. This point is further developed on page 10 of the brief.

The construction and application of the Constitution of the United States and a prior decision of this Court (*Rib-*

nik v. *McBride*) are necessarily involved. The Supreme Court of Nebraska refused to be guided by the principles and doctrines which now govern the decision of this Court in cases involving the regulation of fees or the fixing of prices. A conflict between the *Ribnik* case and other applicable decisions of this Court exists and this Court alone can reconsider and reconcile the principles under which states are to be governed in the exercise of their police power, and the limitation placed upon said power by the Fourteenth Amendment.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court, directed to the Supreme Court of Nebraska, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 31021, State, *ex rel. The Western Reference & Bond Association, Inc., Relator*, v. *V. B. Kinney, Secretary of Labor of the State of Nebraska*, Respondent, and that the said decree of the Supreme Court of Nebraska holding Section 48-508 of the Compiled Statutes of Nebraska, 1929, (Laws of Nebraska, 1921, Chapter 189, pages 701, 704) repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, be reversed by this Honorable Court, and that your petitioner have such other and further relief as may be just and equitable.

WALTER R. JOHNSON,
Attorney General of Nebraska,
DON KELLEY,
Assistant Attorney General of Nebraska,
Counsel for Petitioner.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 671

V. B. KINNEY, Secretary of Labor of the State of Nebraska,

Petitioner,

vs.

STATE OF NEBRASKA, Ex Rel. WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER; and DAVIS SCHOOL SERVICE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Nebraska was filed August 2, 1940. It appears on page 9 of the record and is reported in 138 Neb. 574, 293 N. W. 393. The opinion of the Court was written by Messmore, J. Justice Harvey

Johnsen filed a dissenting opinion which appears on page 19 of the record and is reported in 138 Neb. —, —, 293 N. W. 393, 399.

II.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Judicial Code, Section 237, as amended by the act of January 31, 1928, C. 14, Sec. 1, 45 Stat. 54; U. S. C. A., Title 28, Sec. 344 (b).

2. The original date of the judgment to be reviewed is August 2, 1940 (R. 8). Motion for rehearing was filed September 5, 1940, within the time provided by the rules of the Supreme Court of Nebraska (R. 22), and the motion for rehearing was overruled October 8, 1940 (R. 22).

3. This was an original action in mandamus instituted in the Supreme Court of Nebraska, the highest court of the State where judgment could be had, wherein it was alleged that Section 48-508, Compiled Statutes of Nebraska for 1929 (Laws of Nebraska, 1921, Chapter 189, pages 701, 704) was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 2-3). The Supreme Court held that it was repugnant to said Constitutional provision (R. 18-19).

4. Only one question is raised in this Court on the record. That question is whether the State of Nebraska may, under its police power, establish a reasonable maximum rate of compensation chargeable by a private employment agency, or is the power to regulate by price control, as distinguished from the power to regulate by other methods, *ipso facto* repugnant to the due process clause of the Constitution of the United States.

III.

Statement of the Case.

A sufficient statement of the case will be found in the accompanying petition (p. 2), so in the interest of brevity it will not be repeated here.

IV.

Specification of Errors.

1. The Supreme Court of Nebraska erred in finding and holding that the provisions of Section 48-508, Compiled Statutes of Nebraska, 1929 (heretofore set out verbatim on page 2 of the petition), limiting the fees of private employment agencies is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Nebraska erred in finding and holding that the principles of *Ribnik* v. *McBride*, 277 U. S. 350, 48 S. Ct. 545, were applicable and binding upon it in view of the principles which now govern the action of this Court.

V.

ARGUMENT.

Summary of Argument.

Point A. The decision of the Supreme Court of Nebraska is contrary to and in conflict with current decisions of this Court relative to price regulation as a constitutional exercise of the State's police power.

Point B. The statute in question is not repugnant to the due process clause of the Fourteenth Amendment when tested in the light of recent decisions of this Court.

Point A. Conflict With Current Decisions.

The Nebraska Supreme Court held the following statutory provision invalid:

> "No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all the moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer."

The foregoing statute had been attacked on the ground that it violated Article I, Section 3, of the Constitution of the State of Nebraska, which reads:

> "No person shall be deprived of life, liberty or property, without due process of law."

The State court held that the foregoing statute was valid when tested by the Nebraska 'due process' provision.

However, the State court sustained the challenge to the validity of the statute based upon its repugnancy to the 'due process' clause of the Fourteenth Amendment to the Federal Constitution, relying upon and following the decision of this Court in *Ribnik* v. *McBride*, 277 U. S. 350.

The petitioner believes that this Court has departed from the "public interest" doctrine of the *Ribnik* case. The theory or principle of the *Ribnik* case can be developed briefly by a few short quotations from the opinion. They are:

> "Has the business in question been devoted to the public use and an interest in effect granted to the public in that use? Or, in other words, is the business

one 'affected with a public interest,' within the meaning of that phrase as heretofore defined by this Court?" (277 U. S. 350, 355.)

"Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, Tyson & Bro.-United Theater Ticket Offices *v.* Banton, supra, pp. 431, 437, the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place." (277 U. S. 350, 357.)

"And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices." (277 U. S. 350, 358.)

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price fixing, as we have already definitely decided." (277 U. S. 350, 358.)

Briefly, the effect of the foregoing declarations is that only businesses which are greatly affected by a public interest may be regulated to the extent of "price fixing", and that, even though certain evils exist in businesses subject to regulation generally, they cannot be regulated to the extent of fixing the prices they may charge for their services or goods.

A few references to subsequent decisions of this Court will demonstrate that the principles of the *Ribnik* decision cannot be reconciled with the current attitude of this Court toward the matter of legislative price fixing.

Bearing in mind that the Court in the *Ribnik* opinion recognized that the private employment agency business was sufficiently affected with a public interest to permit of regulation, let us now consider the more recent decision of *Nebbia* v. *New York*, 291 U. S. 502 (1934). From the language of Justice Roberts' opinion we take the following (p. 531):

> "But if, as must be conceded, the industry is [2] subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago."

And subsequently, on p. 536, the opinion said:

> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of the courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. * * * The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control

[2] "Relator concedes that a private employment agency is subject to regulation by the state * * *." From the majority opinion, State v. Kinney, 138 Neb. 574, 293 N. W. 393, 394.

for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."

The definition of "due process" can be more briefly stated by quoting from the opinion of this Court in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391. Chief Justice Hughes, speaking for the Court, said:

"Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

Perhaps it would be well to mention that there was no attack by Relator below challenging the reasonableness of of the law is to prevent overreaching by the employment the statute in question. This was pointed out in the majority opinion (293 N. W. 393, 397) in this language:

> "(In the instant case there is no contention on the part of the relator that that part of section 48-508, Comp. St. 1929, here objected to, is arbitrary or discriminatory.)"

Justice Johnsen concluded his dissenting opinion:

> "The reasonableness of the charge fixed by the legislature in the statute is not raised in this proceeding and so is not involved."

Your petitioner believes that these decisions also support the principles of the *Nebbia* and *West Coast Hotel Company* cases and conflict with the principle of *Ribnik* v. *McBride:*

Tagg Bros. v. *United States,* 280 U. S. 421;
O'Gorman & Young v. *Hartford Fire Ins. Co.,* 282 U. S. 251;
Townsend v. *Yeomans,* 301 U. S. 441;
State Highway Dept. v. *Barnwell Bros.,* 303 U. S. 177;
The Sunshine Anthracite Coal Co. v. *Adkins,* 310 U. S. 381.

Point B. Statute Valid under Recent Decisions.

> "Regulation which is reasonable in relation to its subject and is adopted in the interest of the community *is due process* within the meaning of the provisions of the Fourteenth Amendment that no state shall deprive any person of life, liberty or property without due process of law." (Italics ours.)

The Nebraska statute is valid when tested by the foregoing formula from the *West Coast Hotel Company* case,

supra. The subject of the regulation is the fees charged by private employment agencies for their services in procuring jobs for those seeking them. The obvious purpose of the law is to prevent over-reaching by the employment agency. The only effective way to prevent such an evil is by limiting the amount an agency may exact from the applicant. If, as it is conceded, regulation is permissible, it surely is reasonable to regulate by that method which will accomplish the legislative purpose.

The petitioner does not deem it essential to elaborate on this point, particularly when the only challenge concerns the right or power of the State to regulate fees of a private employment agency, and does not attack the law because it is discriminatory, arbitrary, unreasonable or that it fails to accomplish the legislative aim.

Point B is not of prime importance in this lawsuit. The only important question is whether the principles of *Ribnik* v. *McBride* are going to prevail and leave the private employment agency business in one category and place all other businesses in another category to be governed by the principles of the *Nebbia* case.

Conclusion.

Your petitioner respectfully submits that the final termination by this Court of the questions of law involved in this case is of great importance to the States because of the present increased opportunities for overreaching by agencies. This is due to the stimulation to business, which is returning many to the payrolls. The legislatures of the States should be placed in a position where they can deal with the problem without the restrictions of *Ribnik* v. *McBride.* The question is of more than local interest to Nebraska. The error which the Supreme Court of Nebraska felt that it was compelled to make should be rectified. An opportunity is here offered to this Court to expressly over-

rule *Ribnik* v. *McBride*, thereby eliminating the confusion resulting from it.

The prayer of the petition should, therefore, be granted.

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska,
DON KELLEY,
Assistant Attorney General of Nebraska.

BLANK PAGE

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 31 1941
CHARLES ELMORE CROPLEY
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940.

No. 671.

V. B. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA, PETITIONER,

V.

STATE OF NEBRASKA, EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER; AND DAVIS SCHOOL SERVICE, RESPONDENTS.

BRIEF OF PETITIONER.

WALTER R. JOHNSON,
Attorney General of Nebraska,

DON KELLEY,
Assistant Attorney General of Nebraska,
Counsel for Petitioner.

WESTERN-BRINKMAN CO., Law Briefs, Lincoln, Neb.

BLANK PAGE

INDEX.

Subject Index.

		Page
I.	Statement of the Case	1
	a. Explanatory Statement	1
	b. Opinion of the Court Below	2
	c. Statement of Matter Involved	2
	d. Specification of Errors	2
II.	Propositions of Law	2
III.	Argument	6
	a. Sufficient Facts in the Record to Decide the Issue Before the Court	6
	b. Historical Aspects of Price Fixing	13
	c. Matters Within Judicial Knowledge	52
IV.	Conclusion	58

Table of Cases Cited.

Abie State Bank v. Weaver, 119 Neb. 153, 227 N. W. 922 ---- 6

Abbey Employment Agency v. Robinson, 166 Misc. 820, 2 N. Y. S. (2d) 947 ---- 4, 5, 6, 46

Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336 ---- 4

Andrews v. Montgomery Ward & Co., Inc., 30 Fed. Supp. 380 ---- 3, 4, 42

Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133 ---- 6

Block v. Hirsch, 256 U. S. 135, 65 L. ed. 865 ---- 2, 5, 14

Borden's Farm Products Co., Inc. v. Ten Eyck, 297 U. S. 251, 80 L. ed. 669 ---- 6

Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757 ---- 5, 13

Brazee v. Michigan, 241 U. S. 590, 61 L. ed. 1336 ---- 4, 8

Budd v. New York, 143 U. S. 517, 36 L. ed. 247 ---- 3, 13

Bunting v. Oregon, 243 U. S. 426, 61 L. ed. 830 ---- 2, 6, 14

INDEX—(Continued).

Page

Carolene Products Co. v. Banning, 131 Neb. 429, 268 N. W. 313 ---------- 3

German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011---------- 5, 14

Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151 ---------- 2, 14

Knoxville Iron Co. v. Harbison, 183 U. S. 13, 40 L. ed. 55 ----------2, 5, 14

Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board, 134 Fla. 1, 183 So. 759, 119 A. L. R. 956 ---------- 5, 56

McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315----------3, 4, 5, 14

Muller v. Oregon, 208 U. S. 412, 57 L. ed. 551----------4, 52

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 ----------3, 4, 5, 13, 14, 45

Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175---------- 5

Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940 ----------3, 4, 26

O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251, 75 L. ed. 324----------3, 5, 11, 22

Ribnik v. McBride, (dissenting opinion of Mr. Justice Stone) 277 U. S. 350, 72 L. ed. 913 ---------4, 8, 10, 11, 13, 14, 19, 20, 21, 22, 23, 36, 44, 51

State Highway Department v. Barnwell Bros., 303 U. S. 177, 82 L. ed. 734---------- 6, 41

Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 84 L. ed. 1263----------3, 5, 6, 17, 44

Townsend v. Yeomans, 301 U. S. 441, 81 L. ed. 1210 37

State v. Geest, 118 Neb. 562, 225 N. W. 709------ 4

Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288 ----------3, 4, 23, 25

	Page
Tagg Bros. v. United States, 280 U. S. 420, 74 L. Ed. 524	3, 22
Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984	5
Tyson & Bro. United Theater Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718	15
United States v. Walters Lumber Co., 32 Fed. Sup. 65	3, 4, 42
West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330	3, 4, 6, 19, 38, 59
Wenham v. State, 65 Neb. 394, 91 N. W. 421	4
Wholesale Tobacco Dealers Bureau v. National Candy & T. Co., 11 Cal. 634, 82 Pac. (2d)	2, 40
Wolff Packing Co. v. Court, 262 U. S. 522, 67 L. ed. 1103	17, 22
Yeiser v. Dysart, 267 U. S. 540, 69 L. ed. 775	2, 14

Government Reports.

Report of Bureau of Labor and Industrial Statistics of Nebraska, 1909-11	52
Report of Bureau of Labor and Industrial Statistics of Nebraska, 1913-15	53
Report of Bureau of Labor and Industrial Statistics of Nebraska, 1915-16	54
Bulletin No. 630, United States Department of Labor, September, 1937	54

BLANK PAGE

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940.

No. 671.

V. B. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA, PETITIONER,

V.

STATE OF NEBRASKA, EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER; AND DAVIS SCHOOL SERVICE, RESPONDENTS.

BRIEF OF PETITIONER.

I.

STATEMENT OF THE CASE.

(a) Explanatory Statement.

This brief is submitted for the purpose of answering the argument advanced by respondents in their brief in opposition to petitioner's application for a writ of certiorari, heretofore filed herein, and cover points which are pertinent to the issue. Although the argument advanced by respondents was ineffectual so far as the granting of the writ was concerned, it probably will be urged upon this Court in a consideration of the case upon the

merits. We, therefore, feel that the fallacies of the argument should be called to the attention of the Court.

This brief does not contain any material covered by the previous brief. It is our wish that the Court consider this material herein as supplemental and will read this and the previous brief as though they were one.

(b) Opinion of the Court Below.

See page 7, Brief in Support of Petition for Writ of Certiorari, filed herein.

(c) Statement of Matters Involved.

See page 2, Petition for Writ of Certiorari, filed herein.

(d) Specification of Errors.

See page 9, Brief in Support of Petition for Writ of Certiorari, filed herein.

II.

PROPOSITIONS OF LAW.

I.

Laws may be enacted providing for the prevention of unconscionable gains in any business or vocation affecting the public welfare.

McLean v. *Arkansas*, 211 U. S. 539, 53 L. ed. 315.

Knoxville Iron Co. v. *Harbison*, 183 U. S. 13, 46 L. ed. 55.

Yeiser v. *Dysart*, 267 U. S. 540, 69 L. ed. 775.

Bunting v. *Oregon*, 243 U. S. 426, 61 L. ed. 830.

Block v. *Hirsch*, 256 U. S. 135, 65 L. ed. 865.

Griffith v. *Connecticut*, 218 U. S. 563, 54 L. ed. 1151.

Wholesale Tobacco Dealers Bureau v. *National*

Candy & T. Co., 11 Cal. (2d) 634, 82 P. (2d) 3.

II.

A regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

The West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 81 L. ed. 703, 108 A. L. R. 1330.

The Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 84 L. ed. 855.

United States v. *Walters Lumber Co.*, 32 Fed. Supp. 65.

Andrews v. *Montgomery Ward & Co., Inc.*, 30 Fed. Supp. 380.

Nebbia v. *New York*, 291 U. S. 502, 78 L. ed. 940.

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.

Tagg Bros. v. *United States*, 280 U. S. 420, 74 L. ed. 524.

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 75 L. ed. 324, 75 A. L. R. 1163.

Stephensen v. *Binford*, 287 U. S. 251, 77 L. ed. 288.

Budd v. *New York*, 143 U. S. 517, 36 L. ed. 247.

Carolene Products Co. v. *Banning*, 131 Neb. 429, 268 N. W. 313.

III.

Liberty of contract and liberty of property are subject to the valid exercise of the police power of the state.

Stephenson v. *Binford*, 287 U. S. 251, 77 L. ed. 288.

McLean v. *Arkansas*, 211 U. S. 539, 53 L. ed. 315.

Nebbia v. *New York*, 291 U. S. 502, 78 L. ed. 940, 89 A. L. R. 1469.
Wenham v. *State*, 65 Neb. 394, 91 N. W. 421.
State v. *Geest*, 118 Neb. 562, 225 N. W. 709.

IV.

The regulation of the maximum fee chargeable by an employment agency is a proper exercise of the police power, because the unemployed and the agency do not stand on a plane of bargaining equality.

Andrews v. *Montgomery Ward & Co., Inc.*, 30 Fed. Supp. 380.
United States v. *Walters Lumber Co.*, 32 Fed. Supp. 65.
Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.
Ribnik v. *McBride*, (dissenting opinion of Mr. Justice Stone) 277 U. S. 350, 72 L. ed. 913.
Abbye Employment Agency, Inc. v. *Robinson*, 166 Misc. 820, 2 N. Y. S. (2d) 947.

V.

Courts take judicial notice that the problems of unemployment are of grave public concern.

Adams v. *Tanner*, 244 U. S. 590, 61 L. ed. 1336.
Brazee v. *Michigan*, 241 U. S. 340, 60 L. ed. 1034.
Abbye Employment Agency, Inc. v. *Robinson*, 166 Misc. 820, 2 N. Y. S. (2d) 947.
Muller v. *Oregon*, 208 U. S. 412, 52 L. ed. 551.
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 81 L. ed. 703.

VI.

The State may regulate prices whenever the bargaining parties are not on an equal footing and from such situa-

tion the legislature may reasonably anticipate serious consequences to the community as a whole.

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.

Brass v. *North Dakota*, 153 U. S. 391, 38 L. ed. 757, 14 S. Ct. 857.

German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612.

Terminal Taxicab Co. v. *Kutz*, 241 U. S. 252, 60 L. ed. 984.

Block v. *Hirsch*, 256 U. S. 135, 65 L. ed. 865.

Knoxville Iron Co. v. *Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1.

McLean v. *Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206.

Mutual Loan Co. v. *Martell*, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74.

VII.

Any business is affected with a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to protect the rights of the public.

Miami Laundry Co. v. *Florida Dry Cleaning & Laundry Bd.*, 134 Fla. 1, 183 So. 759, 119 A. L. R. 956.

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 75 L. ed. 324, 72 A. L. R. 1173.

The Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 84 L. ed. 1263.

VIII.

Every possible presumption is in favor of the validity of a statute, and the one asserting invalidity has the burden to show that the statute is unconstitutional.

Abbye Employment Agency v. *Robinson*, 166 Misc. 820, 2 N. Y. S. (2d) 947.

State Highway Department v. *Barnwell Bros.*, 303 U. S. 177, 82 L. ed. 734.

Appel Mercantile Co. v. *Barker*, 92 Neb. 669, 138 N. W. 1133.

IX.

It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains.

Abie State Bank v. *Weaver*, 119 Neb. 153, 227 N. W. 922.

Bunting v. *Oregon*, 243 U. S. 426, 61 L. ed. 830.

Borden's Farm Products Co., Inc. v. *Ten Eyck*, 297 U. S. 251, 56 S. Ct. 453, 80 L. ed. 669.

West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 81 L. ed. 703.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 84 L. ed. 1263.

III.

ARGUMENT.

A.

There Are Sufficient Facts in the Record to Decide the Issue Before the Court.

The respondents contend in their brief, filed in opposition to the granting of a writ of certiorari, that:

> "This court should not be called upon to overrule a decision of the importance of Ribnik v. McBride on a record as deficient as to facts as the one herein." (Respondent's brief, p. 2.)

For a proper approach to a consideration of the argument presented, the issue or issues involved in the lawsuit must be thoroughly understood. We submit that the extent or necessity of a factual background depends entirely upon the issues which are involved in any given controversy.

The issue in this case was limited at the outset by a stipulation of the parties. So far as relevant, it reads:

> "The sole and only issue for determination in the above entitled cause is the constitutionality of Section 48-508, Compiled Statutes of Nebraska for 1929, in so far as the same fixes or limits the fees or compensation of private employment agencies."

The respondents here (relator below) conceded both in their brief and in oral argument that the only issue was whether the State had the right or power to fix or limit the fees chargeable by an employment agency. That is, they admitted that the State could regulate them by any appropriate means other than price limitation. Inasmuch as the brief and argument just alluded to are not a part of the record before this court, we refer to the language of the Supreme Court of Nebraska to support our assertion as to the issue. From the opinion:

> "Relator concedes that a private employment agency is subject to regulation by the state and may be compelled to pay a license fee for the privilege of conducting such business. Brazee v. Michigan, 241 U. S. 340, 36 S. Ct. 561; Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545." (R. 11.)

> "In the instant case it is true that the relator made no claim that the legislation here objected to on the point at issue was arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt." (R. 16.)

As indicated by the quotation, second above, the respondents (relator below) cited the court to the case of *Brazee* v. *Michigan*, which is a strong indication that respondents conceded the force and effect of whatever rule had been announced in that decision. The price regulation provision of the Michigan statute was not before the court in that case, but the question of whether the business of an employment agency was within the category of businesses sufficiently affected with a public interest so as to be subject to regulation under the police power was before the court. On this phase of the case Mr. Justice McReynolds, speaking for the Court, said:

> "Considering our former opinions it seems clear that without violating the Federal Constitution a state, exercising its police power, may require licenses for employment agencies, and prescribe reasonable regulations in respect of them, to be enforced according to the legal discretion of a commissioner. The general nature of the business is such that, unless regulated, many persons may be exposed to misfortune against which the legislature can properly protect them."

While making the concession that the employment agencies were subject to some types of regulation the relator below relied upon *Ribnik* v. *McBride* to support the contention that the *right* to regulate does not extend to price-fixing.

With reference to legislative price regulation this Court, in the Ribnik case, said:

> "* * * at least in the absence of a grave emergency, * * *, the fixing of prices * * * of wages to be paid, whether minimum or maximum, *is beyond the legislative power*" (p. 357) (Italics added.)

"And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices." (p. 358.)

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation but not for price fixing, as we have already definitely decided." (p. 358.)

It thus appears that the challenge thrown out by the respondents was whether the State had the right or authority to regulate the prices of a busines which concededly was subject to other types of regulation. The question of reasonableness was not put in issue. The sole question is, is the State limited in its power to regulate the fees which an employment agency may charge, even though the employment agency business is subject to other types of regulation in the public interest?

We submit that where the only question involved is one as to naked legislative power, and the question of reasonableness is omitted, that an extensive factual record is unnecessary.

The respondents here are entirely responsible for the condition in which this case comes to this Court. One of them instituted the proceedings before the Supreme Court of Nebraska setting forth the reasons why the price limiting provision should be held invalid. The petitioner here (respondent below) filed an answer. The

remaining respondents intervened and adopted the original petition, then the respondents moved for judgment on the pleadings. Surely, it did not devolve upon this petitioner, as respondent below, to make an issue of the reasonableness of the law in question. Therefore, the only reason it is not an issue is because the respondents did not make it one. They were content to rest their case on the sole ground that the legislature simply lacked the power to regulate the fees of an employment agency. The Supreme Court of Nebraska adopted their position. What kind of justice would it be that would permit a litigant to try a lawsuit in one court on an issue which he had raised, and then deny his adversary the right to a review of that very issue in an appellate court because the party who instituted the proceedings did not raise a fact issue? That is substantially the position of the respondents here. They were successful before the Supreme Court of Nebraska on the same pleadings and same factual situation and were satisfied to let that Court decide the issue. But now they want to deny this Court the right to review the judgment of the Nebraska Court because there are not sufficient facts upon which this Court can base a decision. The Supreme Court of Nebraska was not favored with anything which is not before this Court.

On page 4 of respondents' brief they suggest upon what matters evidence should be supplied. Without quoting or repeating all of the suggestions, may we say that whether or not any law is practicable is a legislative problem. And for answers to the balance of the suggestions we quote briefly from the dissenting opinion of Mr. Justice Stone in *Ribnik* v. *McBride, supra*, p. 362, as follows:

"Some presumption should be indulged that the New Jersey legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employment, the number and distribution of employment agencies, the local efficacy of competition, the prevalent practices with respect to fees. On this deserved respect for the judgment of the local lawmaker depends, of course, the presumption in favor of constitutionality, for the validity of a regulation turns 'upon the existence of conditions, pecuilar to the business under consideration'. * * * Moreover, we should not, when the matter is not clear, oppose our notion of the seriousness of the problem or the necessity of the legislation to that of the local tribunals. 'This court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.' (Citing cases.) And the enactments of state legislatures are entitled to no less respect."

We believe the absence of factual data is a greater detriment to respondents' position than it is to that of petitioner. The view of this court is found in *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 75 L. ed. 324. We quote:

"The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does

> not appear on the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness."

Here as in the O'Gorman & Young case the statute "deals with a subject clearly within the scope of the police power." In the O'Gorman & Young case it was alleged that the specific method of regulation was unreasonable, but there was no allegation of fact which would show unreasonableness. In the present case there is no allegation of unreasonableness. The present case is a stronger case than the New Jersey case because of this difference. It is, also, true in the instant case that "it does not appear on the face of the statute or from any facts of which the court must take judicial notice" that evils did not exist in Nebraska for which the price limiting provision was an appropriate remedy.

It is also true in the instant case that the action of the legislature indicates the existence of evils for which price regulation is the appropriate remedy.

In the instant case the action of the Supreme Court of Nebraska indicates that such evils did exist. Petitioner makes this statement in spite of the actual outcome of the lawsuit. It must be remembered that the statute in question was attacked as being repugnant to the due process clause of the Nebraska Constitution as well as that of the Federal Constitution. It must be further remembered that so far as the Nebraska Consti-

tution was concerned the Court held the challenged provision valid (R. 12). It was only the unwillingness of the Nebraska Court to depart from *Ribnik* v. *McBride* which led them to declare the provision invalid.

One might say that blind and unwavering obedience to precedent was responsible for the unfortunate decision of the Nebraska Court.

B.

Historical Aspects of Price Fixing.

Inasmuch as respondents, of necessity, must rely upon *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913, a careful analysis of that case, its antecedents and its subsequent history, considered with related cases seems essential.

The United States Supreme Court had sustained the legislature's power to regulate prices many times prior to the Ribnik decision. And in cases not involving public utilities. A brief resume will suffice to point out to the Court that price regulation had not always been so repulsive to the United States Supreme Court.

In *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77, *Brass* v. *North Dakota*, 153 U. S. 391, 38 L. ed. 757, and *Budd* v. *New York*, 143 U. S. 517, 36 L. ed. 247, regulation of charges which grain elevators could make was upheld.

It has also upheld price regulation in the case of insurance rates. *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. ed. 1011; required miners to be

paid per ton of coal unscreened instead of screened, *McLean* v. *Arkansas*, 211 U. S. 539, 53 L. ed. 315; required employers who paid their employees in store orders to redeem them in cash, *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, 46 L. ed. 55; fixed the fees chargeable by attorneys appearing for injured employees before the Workmen's Compensation Commission, *Yeiser* v. *Dysart*, 267 U. S. 540, 69 L. ed. 775; fixed the rate of pay for overtime work, *Bunting* v. *Oregon*, 243 U. S. 426, 61 L. ed. 830, 37 Sup. Ct. Rep. 435; regulated maximum rents, *Block* v. *Hirsh*, 256 U. S. 135, 65 L. ed. 865; fixed the maximum rate of interest chargeable on loans, *Griffiths* v. *Connecticut*, 218 U. S. 563, 54 L. ed. 1151.

Many other types of regulation interfering with freedom of contract have been sustained by the Supreme Court on the theory that where evils existed it was within the power of the legislature to correct the evil by the type of regulation which would best accomplish that purpose.

The test laid down by Justice Sutherland in the Ribnik case was:

> "Has the business in question been devoted to the public use and an interest in effect granted to the public in that use?"

Justice Sutherland admitted that "the phrase is not capable of exact definition; but, nevertheless, under all of the decisions of this Court from *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77, it is the standard by which the validity of price fixing legislation, in respect of a business like that here under consideration must be tested."

Mr. Justice Stone wrote a masterful dissenting opinion in which he answered every argument advanced by the

majority opinion. In answer to the foregoing quotation he said:

> "Under the decisions of this court not all price regulation, as distinguished from other forms of regulation, is forbidden. As those decisions have been explained, price regulation is within the constitutional power of a state legislature when the business concerned is 'affected with a public interest.' That phrase is not to be found in the Constitution. Concededly it is incapable of any precise definition. It has and can have only such meaning as may be given to it by the decisions of this court. As I read those decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole."

The majority of the Court were unable to distinguish the case from *Tyson & Bro-United Theater Ticket Offices* v. *Banton*, 273 U. S. 418, 71 L. ed. 718, a case where the regulation involved limited ticket brokers in New York from charging in excess of 50 cents over the box office price.

Justice Stone disposed of the ticket broker case in this manner:

> "In dealing with the question of power to require reasonable prices in this particular business, we should remember what was specifically pointed out by the court in Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 438, 71 L. ed. 718, 726, 58 A. L. R. —, 47 Sup. Ct. Rep. 426, that whether a business is affected with a 'public interest' turns 'upon the existence of conditions, peculiar to the business under consideration.' In the respects mentioned, or most of them, and in others

to be pointed out, it seems to me that there is a marked difference between the character of this business and that of real estate brokers, ship brokers, merchandise brokers, and, more than all, of ticket brokers, who were involved in Tyson & Bro.-United Theatre Offices v. Banton, supra. There the attempt was made to limit the advance which brokers might charge over box office prices for theatre tickets, an expedient adopted to break up their monopolistic control of a luxury, not a necessity. Those affected by the practices of the ticket brokers constituted a relatively small part of the population within a comparatively small area of the state of New York. They were not necessitous. The consequences of the fraud and extortion practiced upon them were not visited upon the community as a whole in any such manner as are fraud and imposition practiced upon workers seeking employment. Here the effort is made, as in Knoxville Iron Co. v. Harbison, supra; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Mutual Loan Co. v. Martell, supra; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L. R. A. (N.S.) 1097, 34 Sup. Ct. Rep. 761, first, to protect from abuse a class unable to protect itself, for whose welfare the police power has often been allowed broad play, and, second, to mitigate the evils which unemployment brings upon the community as a whole.

"Some presumptions should be indulged that the New Jersey legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employment, the number and distribution of employment agencies, the local efficacy of competition, the prevalent practises with respect to fees. On this deserved respect for the judgment of the local lawmakers depends, of course, the presumptions in favor of constitutionality, for the validity of a regulation turns 'upon the existence of conditions, peculiar to the business under consideration.' Tyson & Bro.-United Theatre Ticket Offices

v. Banton, supra, 438 (71 L. ed. 726, 58 A. L. R. —, 47 Sup. Ct. Rep. 426)."

We submit that there is logic and common sense in Justice Stone's view.

Justice Sutherland relied upon the Court's prior language in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 67 L. ed. 1103, to sustain his position. From that case he quoted the following:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, *the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation* * * * one does not devote one's property or business to the public used or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances." (Italics added.)

Since the foregoing language says that the business of "the mining operator" or "the miner" is not clothed "with such a public interest that the price of his product or his wages could be fixed" by regulation, it is interesting to note that in *The Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 84 L. ed. 524, an opinion filed May 20, 1940, the United States Supreme Court said that the business of the mining operator and the miner was affected with such a public interest that the price of the product and the miner's wages could be regulated.

The act provided for the regulation of the bituminous coal industry. Its aim was the stabilization of the industry through *price-fixing* and the elimination of unfair competition. The Commission, which is provided

for by the act, has authority to fix minimum and maximum prices in accordance with stated standards.

The Court said:

> "The regulatory provisions are clearly within the power of Congress under the Commerce Clause of the Constitution."

The powers of Congress under the Commerce Clause are restricted by the 5th Amendment in the same manner as the powers of state legislatures are restricted by the 14th Amendment, so that what the Court has to say as to one is generally applicable to both.

From the foregoing it clearly appears that the *Chas. Wolff Packing Co.* case is no longer law so far as its test of "public interest" is concerned.

The third case relied upon by Justice Sutherland to support his views is *Adkins* v. *Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, a case involving an act of Congress, which fixed minimum wages for women and children in the District of Columbia. The Court held the act violated the due process clause of the 5th Amendment and was, therefore, invalid. Justice Sutherland wrote the majority opinion. Chief Justice Taft, Justices Sanford and Holmes all dissented, Taft and Holmes each writing opinions.

In 1937 the minimum wage law of the State of Washington came to the Supreme Court. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330. The Supreme Court of Washington had sustained the law as a reasonable exercise of the police power. Chief Justice Hughes wrote the opinion. In commenting on the action of the State Court in upholding the law he said:

> "In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the Adkins Case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a re-examination of the Adkins Case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the Adkins Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration."

The final paragraph of the opinion dealt the final blow to the "public use" theory which was controlling in the ticket broker case, *Ribnik* v. *McBride* and the *Adkins* case. It reads:

> "Our conclusion is that the case of Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A. L. R. 1238, supra, should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is affirmed."

Thus, we see that one of the supporting props of the Ribnik decision has been completely knocked out and that the theory on which the case was decided has been wholly abandoned. This will more clearly appear as other recent decisions of the Supreme Court are reviewed.

A case decided less than two years following *Ribnik* v. *McBride* is *Tagg Bros. & Moorehead* v. *United States*,

280 U. S. 420. The opinion is written by Brandeis, J., and concurred in by the full Court. Although it does not expressly overrule the Ribnik case, it takes the sting out of it. The plaintiffs brought an action to enjoin the enforcement of regulations prescribed by the Secretary of Agriculture, fixing the fees which commission men could charge the seller for handling his livestock. The regulations were promulgated pursuant to the Packers and Stockyards Act.

Among other arguments advanced by the plaintiffs were the following (p. 438):

> "That while property may be taken for a public use upon payment of just compensation, liberty—personal services—may not be so taken except in time of war or as a punishment for crime; that, since personal services can not be taken for a public use, they cannot be said to be dedicated to a public use or devoted to a public service; that this rate-fixing is in essence wage-fixing, since the stockyard services performed by the plaintiffs involve only skill and labor, and that wage-fixing was held to be beyond the power of Congress, Adkins v. Children's Hospital, 261 U. S. 525; that, even if not obnoxious as an attempt at wage-fixing, the limitation of charges for personal service is precluded by Tyson & Bro. v. Banton, 273 U. S. 418, and Ribnik v. McBride, 277 U. S. 350."

The Court in answer to these contentions said:

> "There is nothing in the nature of monopolistic personal services which makes it impossible to fix reasonable charges to be made therefor; and there is nothing in the Constitution which limits the Government's power of regulation to businesses which employ substantial capital. This Court did not hold in Tyson & Bro. v. Banton and Ribnik v. McBride that charges for personal services cannot be regu-

lated. The question upon which this Court divided in those cases was whether the services there sought to be regulated were *then* affected with a public interest. Whether a business is of that class depends, not upon the amount of capital it employs, but upon the character of the service which those who are conducting it engage to render."

Justice Brandeis almost apologetically explains the reason for the Tyson & Bro. and Ribnik cases. He, in effect, said that the businesses involved in those were not *"then"* affected with a public interest, indicating quite clearly, we think, that *now* those same businesses probably would be sufficiently affected with a public interest to sustain the price-fixing limitation.

We stated that the case does not expressly overrule *Ribnik* v. *McBride,* so having made the implication that it does so in effect we want to be more explicit. Justice Sutherland, in the course of the Ribnik opinion, said:

"The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a *broker*, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate *broker,* ship *broker,* merchandise *broker* or ticket *broker.* In the Tyson & Bros.-United Theatre Ticket Offices Case, supra, we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket *broker,* and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld."

Mr. Justice Sanford concurred with the majority in the Ribnik case because he was unable to distinguish between a labor broker and a ticket broker.

Returning now to the opinion of Brandeis, J., in *Tagg Bros. & Moorehead* v. *United States, supra,* we get both the contention of the plaintiffs and the answer thereto of the Court. It reads:

> "The contention that the Act, if construed as authorizing the order assailed, is void under the due process clause, is likewise unsound. It rests upon the fact that the services for which the Secretary's order fixes the charges are practically the personal services of *brokers.*" (Italics ours.)

In other words, Justice Brandeis says that fixing charges for the personal services of *brokers* is no longer good reason for declaring a price-fixing regulation unconstitutional—the very thing on which the Ribnik decision rested.

The next important case in point of time is *O'Gorman & Young* v. *Hartford Fire Insurance Company,* 282 U. S. 251, 75 L. ed. 324, 72 A. L. R. 1173, decided January 5, 1931. The case involved the constitutionality of a New Jersey statute limiting commissions which an insurance company could lawfully pay to its agents. The state court held the law constitutional. The Supreme Court sustained the law as a valid exercise of the police power. The appellants relied upon *Ribnik* v. *McBride, Tyson & Bro.* v. *Banton,* (Ticket broker case), *Chas Wolff Packing Co.* v. *Court of Industrial Relations* (cited in Ribnik case), and *Adkins* v. *Children's Hospital* (cited in Ribnik case), in support of their position. Van Devanter, McReynolds, Sutherland and Butler, J.J., dissented and in their opinion also cited the same cases.

The effect, then, of the O'Gorman & Young decision was to repudiate the principles of *Ribnik* v. *McBride*. The case is important in some of its other aspects and more fully covered subsequently.

We now wish to call the Court's attention to *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. ed. 288, which was decided December 5, 1932. Mr. Justice Sutherland wrote the opinion and Mr. Justice Butler dissented, but wrote no opinion. As the quotations are read it should be remembered that the language is that of the same justice who wrote the Adkins and Ribnik opinions.

This was an appeal by the plaintiffs from a decree of the highest court of Texas, denying an injunction against the enforcement of a Texas statute requiring contract carriers to charge the same price as common carriers. The appellants claimed that their business was not affected with such a public interest as to justify the legislature in fixing the prices for which they could haul merchandise, and cited *Tyson & Bro.* v. *Banton* and *Ribnik* v. *McBride*.

After discussing the evils resulting from the unregulated use of the highways by contract carriers, Sutherland, J., said:

> "Certainly, the removal or amelioration of that burden, with its resulting injury to the highways, interference with their primary use, danger and inconvenience, is a legitimate subject for the exercise of the state legislative power. And that this was one of the chief ends sought to be accomplished by the provisions in question, the record amply establishes.
>
> "The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to

> which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not to that of the courts. *It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end.*" (Italics supplied.)

Then he said:

> "Turning our attention then to the provision for permits, it is to be observed that the requirement is not that the private contract carrier shall obtain a certificate of public convenience and necessity, but that he shall obtain a permit, the issue of which is made dependent upon the condition that the efficiency of common carrier service then adequately serving the same territory shall not be impaired. Does the required relation here exist between the condition imposed and the end sought? We think it does. But in any event, if the legislature so concluded, as it evidently did, that conclusion must stand, since we are not able to say that in reaching it that body was manifestly wrong (citing cases). Debatable questions of this character are not for the courts, but for the legislature, which is entitled to form its own judgment."

What the opinion has to say on the question of minimum rates is interesting because of what is said with reference to freedom of contract. It is admitted that this particular opinion does not go so far that we can truthfully say that it supports entirely Respondent's position. However, it is important in that it indicates the trend of the Court back to the position taken by Mr. Justice Stone in his dissenting opinion in the Ribnik case, when he said:

"I cannot accept as valid the distinction on which the opinion of the majority seems to me necessarily to depend, that granted constitutional power to regulate there is any controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property. Obviously, even in the case of businesses affected with a public interest, other control than price regulation may be appropriate, and price regulation may be so inappropriate as to be arbitrary or unreasonable, and hence unconstitutional. To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered. In this respect I can see no difference between a reasonable regulation of the use of property, which affects its price or economic return. The privilege of contract and the free use of property are as seriously cut down in the one case as in the other."

Here is what Justice Sutherland said in *Stephenson v. Binford, supra*:

"The principle that Congress may regulate private contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created, Highland v. Russell Car & Snow Plow Co., supra (279 U. S. at p. 261, 73 L. ed. 691, 49 S. Ct. 314), applies to a state under like circumstances."

Our conclusion is that this opinion recognizes the right of the State to regulate private contracts in whatever manner necessary to remedy evils which may grow out of such contracts.

In the final analysis the Binford case rested on the proposition that the State could regulate private contracts in order to preserve the State's highways. *Is the preservation of the earning power of those who deal with employment agencies of a lesser interest to the State of Nebraska than the preservation of the highways is to the state of Texas?*

Nebbia v. *New York*, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, decided March 5, 1934, is of paramount importance because it is the culmination of the trend which we have tried to indicate in our discussion of the cases since *Ribnik* v. *McBride*.

As is said in the A. L. R. Note (89 A. L. R. 1495):

> "The great importance of this decision (Nebbia v. New York [U. S.] ante, 1469) is obvious. The court in this case gives a new meaning to the phrase 'affected with a public interest,' or rather concludes that this formula is without value in determining the power of a state to regulate a business. *And this decision definitely removes the taboo against price-fixing, and establishes the principle that the private character of a business does not prevent the state from regulating prices therein.* The limitation or test set up by the court is that the legislation must not be arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. And, on these principles, the New York state regulations fixing the price of milk were held to be valid." (Italics supplied.)

The majority opinion was written by Mr. Justice Roberts.

The case involved the constitutionality of a New York Statute which created a Milk Control Board with power to "fix minimum and maximum retail prices to be charged

by * * * stores to consumers off the premises where sold."

The question presented was whether the Federal Constitution prohibited the State from fixing the selling price of milk.

The Court's first consideration was "the occasion for the legislation and its history." It is our intention to give the Court a brief history of the legislation involved here, including the evils sought to be remedied by the law here in question.

Because this case is somewhat of a landmark we quote at length therefrom:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form 'a portion of that immense mass of legislation, which embraces every thing within the territory of a state, * * * all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, * * * are component parts of this mass.'
>
> "Justice Barbour said for this court:
>
> " 'It is not only the right, but the bounden and solemn duty of a state, to advance the

safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal policy, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.'

"And Chief Justice Taney said upon the same subject:

"'But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States.'

"Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal govern-

ment, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

"The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

"The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits

are vital to the paramount interests of the community. The state may control the use of property in various ways; may prohibit advertising bill boards except of a prescribed size and location, or their use for certain kinds of advertising; may in certain circumstances authorize encroachments by party walls in cities; may fix the height of buildings, the character of materials, and methods of construction, the adjoining area which must be left open, and may exclude from residential sections offensive trades, industries and structures likely injuriously to affect the public health or safety; or may establish zones within which certain types of buildings or businesses are permitted and others excluded. And although the Fourteenth Amendment extends protection to aliens as well as citizens, a State may for adequate reasons of policy exclude aliens altogether from the use and occupancy of land.

"Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process. These measures not only affected the use of private property, but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property rights.

"The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.

"Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them."

The argument of the appellant in the Nebbia case is substantially that of the Respondents here. After discussing the evils sought to be remedied by the price-fixing law, the Court stated the position of the appellant thus:

"But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, *the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden.* His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or

one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends." (Italics added.)

The answer which follows is the same one which should be applied to the contentions of the Respondents.

The answer:

"We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, *what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle.* The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents or property. *The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself.* This view was negatived many

years ago. Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. Munn and Scott held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. *No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves.* Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a 'virtual monopoly.' This meant only that their elevator was strategically situated and that a large portion of the public found it highly inconvenient to deal with others. This court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the polic power. It is true that the court cited a statement from Lord Hale's De Portibus Maris, to the effect that when private property is 'affected with a public interest, it ceases to be juris privati only;' but the court proceeded at once to define what it understood by the expression, saying: 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large' (p. 126). This understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power;' and it is plain that nothing more was intended by the expression. The court had been at pains to define that power (pp. 124, 125) ending its discussion in these words:

" 'From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the states from doing that which will operate as such a deprivation.'

"In the further discussion of the principle it is said that when one devotes his property to a use, 'in which the public has an interest,' he in effect 'grants to the public an interest in that use' and must submit to be controlled for the common good. The conclusion is that if Munn and Scott wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

"The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. *The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks on a business which public interest demands shall be regulated, he must know regulation will ensue.*" (Italics supplied.)

After reviewing a number of decisions affirming the right of the state to fix or regulate prices the opinion continues:

"It is clear that there is no closed class or category of businesses affected with a public interest, and

the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 535, 67 L. ed. 1103, 1108, 43 S. Ct. 630, 27 A. L. R. 1280. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, *it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices.* These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. *But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.*

"*So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.* The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial de-

termination to that effect renders a court functus officio." (Italics supplied.)

We quoted above the manner in which the majority opinion disposed of the "affected with a public interest" decisions. We want, for the purpose of emphasis, to restate a part of that quotation:

> "These decisions must rest, *finally* upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect."

"These decisions" refer to the *Tyson & Bro.* v. *Banton,* and *Ribnik* v. *McBride* type of decision.

But the decision in *Ribnik* v. *McBride, supra,* did not rest upon the basis that the regulation was "arbitrary in its operation and effect." It went off on the proposition that "the fixing of *prices for food* or clothing, of house rental or of wages to be paid, whether minimum or maximum, *is beyond the legislative power.*"

"The fixing of prices for food" is exactly what the Court approved in the Nebbia case and exactly what they disapproved (by classification) in the language of the Ribnik decision. The cases simply cannot be reconciled. The effect, therefore, is that the Nebbia decision overruled the Ribnik decision *sub silentia.*

This position is further substantiated by the fact that the appellants in the Nebbia case cited and relied upon *Ribnik* v. *McBride,* and the argument advanced follows the reasoning of the Court in *Ribnik* v. *McBride.* Also, the dissenting opinion cites *Ribnik* v. *McBride* in support of the contention that "a state lacks power to fix prices in similar private businesses." (89 A. L. R. 1491; 291 U. S. 502, 547.)

We again call to the Court's attention that no claim is made by the Relator that the price-limiting regulation here involved is arbitrary, or unreasonable, nor that such means does not remedy the evil which the legislature intended to remedy.

In 1936 the United States Supreme Court rendered another decision in which price-fixing was assailed as repugnant to the 14th Amendment. The case is *Townsend* v. *Yeomans*, 301 U. S. 441, 81 L. ed. 1210. The opinion was written by Chief Justice Hughes, and it is significant to note that there were no dissents. It is also worthy of mention that *Ribnik* v. *McBride* was cited by those attacking the law.

The action was one to restrain the enforcement of a Georgia statute fixing the maximum charges that warehousemen could impose upon the seller for handling and selling leaf tobacco. The Georgia Supreme Court had sustained the law as a valid exercise of the police power. The Supreme Court affirmed their judgment, saying:

> "So far as the present controversy turns upon the power of the State to give this sort of protection to this industry, provided its regulation is not arbitrary or confiscatory and in the absence of conflict with the federal power over commerce, our rulings are decisive in support of the state action. Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468, 4 Inters. Com. Rep. 45; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 14 S. Ct. 857, 4 Inters. Com. Rep. 670; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L. R. A. 1915C 1189; O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130,

72 A. L. R. 1163; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1649."

It is significant to note that the Court cited as authority for the above proposition, *Munn* v. *Illinois* and *German Alliance Ins. Co.* v. *Lewis,* both of which cases were *decided prior to Ribnik* v. *McBride,* and that also cited in support of this proposition was *O'Gorman and Young* v. *Hartford Fire Ins. Co.,* and *Nebbia* v. *New York.* The latter two decisions we have already discussed, both of which were *decided after Ribnik* v. *McBride.* We call this fact to the Court's attention as a further indication that the *Tyson & Br.* v. *Banton* and *Ribnik* v. *McBride* decisions were "astrays." Both before and after those decisions (and the Adkins decision which we have heretofore discussed) the Court has approached this type of regulation on the theory that the State in the exercise of the police power could correct an existing evil by any method which would remedy the situation, unless the regulation was arbitrary or unreasonable. In other words, liberty of contract was recognized as being subject to the valid exercise of the police power.

We heretofore, in the discussion of the Ribnik case, noted the fact that *Adkins* v. *Children's Hospital, supra,* was expressly overruled by *West Coast Hotel Co.* v. *Parrish, supra.* It will be recalled that the Adkins decision invalidated an act of Congress establishing a minimum wage limit for women and children. The West Coast Hotel Company case upheld the same type of law as a valid regulation and not in conflict with the due process provisions of the Constitution. After stating that the Supreme Court of Washington had upheld the statute as a reasonable exercise of the police power, Chief Justice Hughes stated:

"In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the Adkins Case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a re-examination of the Adkins Case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the Adkins Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration." (300 U. S. 379, 389.)

In discussing the limitations imposed by the 14th Amendment, the opinion states:

"The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the Adkins Case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under

the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

Again the Court, in effect, overruled *Ribnik* v. *McBride*.

A case which states our position clearly and forcibly is *Wholesale Tobacco Dealers Bureau of Southern California, Inc.*, v. *National Candy & Tobacco Co.*, 11 Cal. (2d) 634, 82 Pac. (2d) 3, decided by the Supreme Court of California on July 28, 1938. It will be noted that the appellant there contended for the adoption of the same rule that Relator is urging upon the Court in the present case. The following is from the opinion by Waste, C. J. (p. 13):

"Appellant, and amici curiae on its behalf, urge that, except as to businesses affected with a public interest, the owner of an article has the constitutional right to sell his property at any price he may desire; that the statute is a price-fixing statute; that price-fixing statutes, except as to businesses affected with a public interest, are per se unconstitutional; that the statute unlawfully interferes with its freedom of contract and unlawfully interferes with its freedom of action. Appellant relies on such cases as Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280; Tyson & Bro. Ticket Offices v. Banton, 273 U. S. 418, 47 S. Ct. 426, 71 L. Ed. 718, 58 A. L. R. 1236; Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 S. Ct. 506, 71 L. Ed. 893, 52 A. L. R. 163; RIBNIK v. McBRIDE, 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, 56 A. L. R. 1327; Williams v. Standard Oil Company, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; New State Ice Co. v. Liebmann, 285 U. S. 262, 52 S. Ct. 371, 76 L. Ed. 747.

"We do not find it necessary to analyze the above-cited cases. There is no doubt some general language in these cases which tends to sustain appellant's contentions. *The point is that in more recent decisions of the United States Supreme Court these cases have been discussed and have been held not to prohibit the enactment of state statutes predicated on substantially similar concepts as the one here involved.* The leading case on the subject is Nebbia v. New York, supra, involving the validity of the Milk Control Law of New York, which provided for a milk control board with the power to fix the minimum and maximum retail price to be charged for milk. Nebbia was prosecuted for selling milk below the price fixed by the board. Both the New York Court of Appeals (People v. Nebbia, 262 N. Y. 259, 186 N. E. 694) and the United States Supreme Court, supra, upheld the statute as a valid and proper exercise of the police power." (Italics added.)

Another recent case from this court is *State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. ed. 734. It was decided February 14, 1938. The opinion was written by Mr. Justice Stone. This was an appeal by the defendants from a decree of the District Court of the United States for the Eastern District of South Carolina, enjoining the enforcement of a state statute prohibiting the use on state highways of motor trucks whose width exceeded the statutory limit. The Supreme Court reversed the District Court, saying that

"the judicial function *under* * * * the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present acted within its province, *and whether the means of regulation chosen are reasonably adapted to the end sought.*"

In 1938 Congress passed the Fair Labor Standards Act, which is commonly known as the Wages and Hours

Law. This law established a minimum below which wages could not go and provided for limiting hours. This was one of the things that the opinion in *Ribnik* v. *McBride* said could not be done. In at least three cases arising in Federal District Courts, the Wages and Hours Law has been upheld. In upholding the Wages and Hours regulations, the Court's reasons should be noted because the justification for that law is one of the justifications for the limitation on the amount which an employment agency may exact from an applicant. The United States District Court for the Northern District of Illinois, in *Andrews* v. *Montgomery Ward & Co., Inc.*, 30 F. Supp. 380, stated in the course of its opinion:

> "Regulations of wages and hours of labor is a proper exercise of police power. Employer and employee *do not stand on a plane of equality.* Wages, especially of unskilled employees, tend toward the lowest point at which the laborer can subsist. *The resulting conditions are of interest, not only to the wage earner but the whole community.* The slums of our great cities are, in large part, the fruits of low wages. Vice, crime and disease breed in these districts and spread throughout the community. Certainly if it is within the power of the state to regulate the commissions that may be paid to insurance agents, it is not an unwarranted exercise of the police power to prescribe minimum wages for the protection of the health and good order of society." (Italics added.)

The matter of inequality between the unemployed, who seeks a job, and the employment agency, is a sufficient justification for the intervention by the legislature in behalf of the job seeker.

On March 13, 1940, the District Court of the Southern District of Florida, in *United States* v. *Walters Lumber*

Co., 32 Fed. Supp. 65, in discussing the constitutionality of the Wages and Hours Law, said:

"As to the objection that the statute, by prescribing minimum wages and hours in industry, deprives defendants of liberty of contract without due process of law, contrary to the Fifth Amendment, see West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703, 108 A. L. R. 1330, sustaining a state statute prescribing minimum wages for women and minors as against the same objection based on the Fourteenth Amendment, and Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842, 81 L. ed. 1210, sustaining as against a like objection, a state statute prescribing maximum charges for handling and selling leaf tobacco. See, also, the 'Minimum Wage' decisions cited in Kent Stores of New Jersey v. Wilentz, D. C. 14 F. Supp. 1, text page 4. Cit. Nebbia v. People of State of New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940, 89 A. L. R. 1469.

"In the West Coast Hotel Co. case, the Supreme Court said: 'The constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. * * * But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the constitution is thus necessarily subject to the restraints of due process, and *regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process* * * * Freedom of contract is a qualified, and not an absolute, right, * * * Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * * *This power under the constitution to restrict freedom of contract* * * * *between employer and employee is undeniable.* * * * In dealing with the relation of employer and em-

> ployed, the legislature has necessarily a wide fiel of discretion in order that there may be suitabl protection of health and safety, and that peace an good order may be promoted through regulation designed to insure wholesome conditions of wor and freedom from oppression." (Italics added.)

The last word of the Supreme Court of the Unite States on price-fixing, is found in *The Sunshine An thracite Coal Co.* v. *Adkins*, the opinion in which wa filed May 20, 1940. It is reported in 310 U. S. 381 84 L. ed. 1263. The act before the Court was on designed to regulate the bituminous coal industry b prescribing minimum and maximum prices for the pro duct of the mine operators. Again we must point ou the adopted language of Justice Sutherland in *Ribnik* v. *McBride, supra*, which was:

> "It has never been supposed since the adoption of the constitution, that the business of * * * *the mining operator or the miner was clothed with such a public interest that the price of his product o his wages could be fixed by state regulation.*"

The law involved in the anthracite coal decision teste by the rule laid down in *Ribnik* v. *McBride* is unconsti tutional. However, the Supreme Court held the act vali and not a violation of the due process provision of th Constitution. We wish to call to the Court's attentio the language found on page 394, which reads:

> "Nor does the Act violate the Fifth Amendment *Price control is one of the means available to th states* (Nebbia v. New York, 291 U. S. 502) an to the Congress (United States v. Rock Royal Co operative, Inc., supra) in their respective domain (Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511) *for the protection and promotion of the welfare o the economy.* But appellant claims that this Act i

not an appropriate exercise of the Congressional power. It urges that the nature and use of bituminous coal in nowise endanger the health and morals of the populace; that no question of conservation is involved; that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry; and that the consuming public will be deprived of the wholesome restrictions of the anti-trust laws. Those matters, however, relate to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen—matters which are not our concern. If we endeavored to appraise them we would be trespassing on the legislative domain." (Italics added.)

That the legislature adopted the test laid down at least as far back as *Munn* v. *Illinois,* is borne out by the following language of the Court:

> "It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry."

The test reduced to its simplest form requires only that appropriate methods be adopted to correct the particular evil. This shows clearly that the United States Supreme Court has gotton away from the unfortunate decision in *Ribnik* v. *McBride* and those cases on which it was based.

Not only has the United States Supreme Court gotten away from *Ribnik* v. *McBride, supra,* and all that it stood for, but the State courts have recognized the fact

and they are falling into line behind *Nebbia* v. *New York*, and *West Coast Hotel Co.* v. *Parrish, supra*. The California case of *Wholesale Tobacco Dealers Bureau of South Carolina, Inc.*, v. *National Candy & Tobacco Co., supra*, is an example of this. However, we are unusually fortunate in this connection in having a case from the Supreme Court of New York, decided February 14, 1938, which involved the validity of a price limiting provision in the New York law regulating private employment agencies. The case was a civil action by an agency to recover fees in excess of the statutory limits as per a contract entered into by the parties. The employee defended on the ground that the contract was void, being in violation of the statute. Because of the many points involved in that case which are important here, we quote liberally from *Abbye Employment Agency* v. *Robinson*, 166 Misc. 820, 2 N. Y. S. (2d) 947:

> "* * * The question to be determined is whether the due process clause of the Federal Constitution, Amendment 14, was contravened when the Legislature fixed the maximum fees provided in the section.
>
> "The New York Statute is distinguishable in a material feature from that involved in the case of Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, 56 A. L. R. 1327, upon which the plaintiff and court below relied in holding the section unconstitutional. There the Legislature had conferred upon the commissioner of labor the power to fix the charges of employment agents for services. Here the Legislature itself fixed the gross fees chargeable to applicants for employment in the enumerated occupations, what at a glance are seen to be common labor of a necessitous class. (In the case at bar the Nebraska Legislature classified all types of job applicants in the one category, feeling that *all* needed the protection of the price limiting provision.) That statute may be said to have in-

jected a stranger to the parties into their contract to decide what compensation for services the parties could agree upon. Our statute leaves the parties free to agree upon the compensation, but marks out the boundary between reasonable rate and extortionate charge. * * *

"We are mindful of the rule that the interpretation of the Federal Constitution by the United States Supreme Court is binding on state courts. (Citing cases.) We also have in mind the rule of the United States Supreme Court that the meaning fixed by the decision of the highest state court will be accepted as being specifically expressed in the statute. However, in the consideration by state courts of the validity under the Federal Constitution of a state statute substantially similar to the statute of another state, *a contrary decision in respect of the latter by the Supreme Court of the United States is not necessarily controlling if it can be fairly demonstrated that the statute under consideration by the state courts is not identical or for other reasons should receive a different interpretation.*

"There has not been any decision called to our attention nor has our investigation discovered any in which any appellate court of our state in a considered opinion has held that section 185 was unconstitutional as a matter of first impression or as controlled by the Ribnik case. It appears also that, in view of the decision of the United States Supreme Court in West Coast Hotel Co. v. Parrish, 300 U. S. 379, etc., reconsideration may be had of constitutional questions decided in a prior case where the validity of the principles upon which that decision rests is challenged and the constitutional interpretation of a different statute is affected by the previous decisions. In the West Coast Hotel Co. Case the validity of the principles upon which the decision in Adkins v. Children's Hospital of District of Columbia, 261 U. S. 525, etc., rested, was challenged. The Adkins Case held invalid the District

of Columbia Minimum Wage Act. The Minimum Wage Law of Washington was attacked in the West Coast Hotel Co. * * * In its conclusion the state court refused to regard the decision in the Adkins Case as determinative. It invoked principles established by other decisions and pointed to them in justifying its decision. * * * In the West Coast Hotel Co. Case the Supreme Court held the position taken by the Washington state court required a reconsideration of the Adkins Case, and upon so doing, overruled that case and affirmed the judgmentment of the Supreme Court of Washington. The Adkins Case and the reasons upon which it was decided were in a measure the basis of the decision in the case of Ribnik v. McBride, supra. As stated, we are of the opinion that the provisions of the New York statute are not identical with the provisions involved in the Ribnik case. In addition, *the principles relied upon in the majority opinion there are challenged here and principles established by other cases are invoked.* * * *.

"Guided by the authority of the West Coast Hotel Co. Case, and for the reasons expressed above, we feel that we are not controlled by the Ribnik Case. * * *

"We are of the conviction that the provisions of section 185, fixing maximum charges of employment agencies to applicants, do not violate the clause of the Fourteenth Amendment providing that no state shall deprive any person of property without due process of law. The regulation of employment agencies was recognized in Brazee v. People of State of Michigan (giving citations); Adams v. Tanner, 244 U. S. 590, etc., and in Ribnik Case, which stated: 'That the state has power to require a license and regulate the business of an employment agent does not admit of doubt.' * * * It has been held that, unless the business is 'affected with a public interest' the contsitution prohibits legislation fixing prices or charges for services and requires that same be left

to the free agreement of the parties. (Citing Munn v. Illinois and other cases.)

"The Legislature, we are persuaded, in the enactment of the statute regulating employment agencies, did not act without reason or for reasons of expediency or in the exercise of an arbitrary power. We indulge the presumption that the Legislature at the time of the enactment had adequate knowledge of evils existing in the dealings between employment agencies and applicants for employment to require a license, the regulation of the business and the fixation of gross fees, * * *. There existed conditions peculiar to the business which affected it with a public interest and required the provisions enacted. Were such presumption denied, recourse is open to us, as it was to the Legislature, to a mass of information on the subject, much of which is given in the minority opinion and footnotes in the Ribnik Case.

"* * * The regulation generally and in particular in respect of maximum charges were designed to insure freedom from oppression by those of a necessitous class in whom the state had a special interest, who were liable to be, and in fact were shown to be, overcharged and exploited by unscrupulous employment agents. In time of depression the public has a particular interest that the unemployed in seeking employment be not subjected to extortionate charges. Unparalleled demands for relief are made upon public funds. When a choice is open between accepting public relief or paying extortionate charge, many are likely to go on public relief. Unfortunately, many others who are conscientious and ambitious will take any employment offered even at extortionate charges rather than accept public relief. These considerations render maximum charges a reasonable regulation. No claim is made that the charges provided are unreasonable or unfair for the service rendered.

Inability to regulate through a maximum charge may circumvent, or render ineffectual, the power to maintain a minimum wage, and thus endanger the right of the applicant to obtain a living wage.

"In the expression of our views we have placed reliance not alone upon principles expressed by the majority of decisions, but also upon many expressed by distinguished jurists in dissent. We might appropriately quote at length from both. We feel that they may be read with more profit in their original context and setting. However, the final observations we intended to make are so clearly and concisely stated by others that we adopt their language to express our thoughts: 'The powerful dissents in Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336; Tyson & Bro.-United Theatre Ticket Offices v. Banton (supra); Ribnik v. McBride (supra), and the narrow margin by which the views of the majority prevailed, warn us that the doctrines of these cases are not likely to extend beyond the precise facts presented.' National Employment Exchange v. Geraghty, 2 Cir., 60 F. (2d) 918, 921, Hand, J. *'No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. * * *.*" (Italics added.)

The respondents in their brief in resistance to petition for writ of certiorari (p. 4) suggest that it should appear in the record of this case what are "the mischiefs or evils, if any, which have grown out of the administration of employment agencies, which price-fixing is calculated to cure." And they added: "In this connection consideration should be given to the existence

of federal, state, charitable and labor-union agencies, established in part under authority of Congress."

We have already discussed this from the angle of such information being essential to a decision of this case. However, there is still another answer which, perhaps, should not be overlooked.

The reason for the establishment of the public agency is found in Justice Stone's dissent in *Ribnik* v. *McBride*, *supra*. A few excerpts will illustrate the point:

> "Examination of the various reports of public bodies and the legislation referred to can, I think, leave no doubt that the practice of the private agencies with respect to their fees presented a problem for legislative consideration different from any other that this court has passed on in ruling on the power to regulate prices, but certainly more akin to that in Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, and German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 409, 58 L. ed. 1011, 1020, L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612, than to that in Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 438, 71 L. ed. 718, 726, 58 A. L. R. —, 47 Sup. Ct. Rep. 426, and, unless we are to establish once and for all the rule that only public utilities may be regulated as to price, the validity of the statute at hand would seem to me to be beyond doubt. Certainly it would be difficult to show a greater necessity for price regulation."

The respondents suggest that, perhaps, the establishment of public employment agencies might have eliminated the evils which existed prior to their establishment. One answer is that if such is true the legislature failed to realize it and recognize it by modifying or repealing the law.

Another answer is that evils may persist along with competition and when they do the legislature may interfere in the same manner as though no competition existed. This was ably pointed out by Justice Stone in his Ribnik dissent. After enumerating the instances where legislative price-fixing had been sustained as valid regulations he observed (p. 375):

> "In each of these cases the police power of the state was held broad enough to warrant an interference with free bargaining in cases where, despite the competition that ordinarily attends that freedom, serious evils persisted."

C.

Matters Within Judicial Knowledge.

Mr. Justice Brewer, speaking for this Court in *Mullen* v. *Oregon*, 208 U. S. 412, 52 L. ed. 551, 555, said:

> "We take judicial cognizance of all matters of general knowledge."

Mr. Justice Stone suggested in the Ribnik dissent that an examination of reports of public bodies would show the existence of the evil which price fixing was intended to correct. An examination of official reports of the Bureau of Labor of Nebraska will show the existence of many evils in Nebraska prior to the enactment of the present law regulating private employment agencies.

The Twelfth Biennial Report of the Bureau of Labor and Industrial Statistics of Nebraska, covering the period from January 6, 1909, to December 1, 1910, at page 9 states:

"The employment agency evil as conducted in our large cities is enormous and growing. Thousands of dollars are filched from the poor men and women seeking employment, and often they are sent hundreds of miles only to find they have been deceived and abandoned."

The Fourteenth Biennial Report of the Bureau of Labor and Industrial Statistics of Nebraska, covering the period from February 1, 1913, to December 1, 1914, page 11, contains the following statement:

"I believe a law should be enacted requiring all labor agencies operating in the state to procure a license from the commissioner of labor before engaging in that line of business. It is true these agencies are at present operating under ordinances adopted by the different cities in which they are located, but so much complaint has reached this Department concerning this method of doing business that I suggest a state supervision of all such agencies."

The Fifteenth Biennial Report of the Bureau of Labor and Industrial Statistics of the State of Nebraska, covering the 1915-16 biennium, contains a lengthy discussion of the legislation in Nebraska and other states dealing with the problems created by private employment agencies. The following is taken from page 16:

"Employment agencies conducted for hire specialize. While one agency will cater to tradesmen and unskilled laborers, another agency will cater to those seeking clerical employment. The agency specializing in the trades and unskilled labor field lists the wants of employers and then for a fee gives the information to applicants. The bonding and reference agencies, specializing clerical employments, such as stenographers, salesmen, accountants, etc., first exact a fee from the applicant, commonly called

a registration fee, and then promises to place the applicant. If the agency succeeds in finding employment for the applicant, and the applicant accepts, the applicant must assign not less than 25 per cent of the first month's wages to the agency as a fee for securing the employment, this 25 per cent of the first month's wages being in addition to the registration fee, and sometimes the per cent charged the applicant is as high as 60 per cent—measured generally by just what the traffic will bear. If the applicant secures an advance in wages during a specified time the agency demands an additional per cent from the applicant. If the applicant fails to pay the fee the agency brings suit and garnishees the employer. This procedure generally results in the applicants submitting to the demands of the agency or the loss of employment. The registration fee charged the applicant in the first instance is retained by the agency in each case, regardless of the fact as to whether employment is furnished or not."

The United States Department of Labor, in September, 1937, issued Bulletin No. 630, which contains "Laws Relating to Employment Agencies in the United States as of July 1, 1937."

From the text dealing with private employment agencies, page 6, we quote the following:

"At the present time in the United States there are 42 states which have enacted legislation directly or indirectly regulating the operation of private employment offices. In most of the states provisions are made for the licensing and bonding of such agencies. In addition to the private employment agencies conducted for profit, agencies are also established by various philanthropic organizations, trade-unions, and associations of employers. Agencies created for the placement of professional

workers such as teachers, nurses, etc., are also numerous.

"In the state of Idaho the maintenance of private employment offices for profit is forbidden. Exceptions are made, however, in the case of non-profit employment offices conducted by religious, benevolent, or charitable societies, and those furnishing professional employment.

"One of the reasons given for the establishment of public employment agencies is the alleged abuses practiced by many of the private agencies."

Some of the more common of the fraudulent methods were enumerated by the United States Bureau of Labor in 1912 as follows:

1. Charging a fee and failing to make any effort to find work for the applicant.

2. Sending applicants where no work exists.

3. Sending applicants to distant points where no work or where unsatisfactory work exists, but whence the applicant will not return on account of the expense involved.

4. Collusion between the agent and employer, whereby the applicant is given a few days' work and then discharged to make way for new workmen, the agent and the employer dividing the fee.

5. Charging exorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc.

6. Inducing workers, particularly girls, who have been placed, to leave, pay another fee, and get a "better job".

In spite of the Ribnik decision there are still 26 states which have provisions in their laws to regulate the fees chargeable by the agecies. A compilation of

all the state statutes is contained in the Department of Labor Report of 1937, beginning at page 117.

From the Labor Department Reports, State and Federal, it is obvious that serious evils existed at the time the legislation in question was enacted. There is no showing here that the nature of the business has changed by reason of a change in conditions which would make regulation any less essential now than when the law was enacted. And the Nebraska Legislature has not seen fit to repeal the regulation.

We think the Supreme Court of Florida in *Miami Laundry Co.* v. *Florida Dry Cleaning and Laundry Board*, 134 Fla. 1, 183 So. 759, 119 A. L. R. 956, wrote a fitting summary for the position the Relator takes in this lawsuit. We quote from a very well reasoned opinion by Terrell, J.:

> "The factors determining the regulation of a trade, business, or profession are for legislative determination, but they have generally been actuated by public necessity. If done in the exercise of the police power, the health, morals, and welfare must be involved. It has also been said that the business regulated must be affected by or clothed with a public interest, but regardless of the basis on which done, if public necessity requires it would be contrary to every concept of social justice to hold that the legislature could not grant relief. One may 'Robinson Crusoe like' isolate himself and thereby enjoy the complete unrestrained exercise of his constitutional guaranties, but the moment he becomes a unit in organized society, he surrenders a measure of his freedom and the more thickly that society becomes populated and the more complex its means of making a living become, the more freedom he must make up his mind to surrender.

"There is no magic in the phrase, 'clothed with or affected with a public interest.' Any business is affected by a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public and when this point is reached, the liberty of contract must necessarily be restricted. If the regulation involves the question of price limitation, it will be upheld unless clearly shown to be arbitrary, discriminating, or beyond the power of the legislature to enforce. Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940, 89 A.L.R. 1469; Borden's Farm Products Co., Inc., v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453, 80 L. ed. 669; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703, 108 A. L. R. 1330; Highland Farms Dairy v. Agnew, 300 U. S. 608, 57 S. Ct. 549, 81 L. ed. 835. (And other cases.)

"These cases involve some element of the question of price fixing and support the rule that when the conditions in a business become such that the welfare of the public will not be adequately protected by unrestricted competition, or if it be shown that ruinous and chaotic conditions are otherwise about to be brought about in the business, that the economic existence of large numbers of people is being threatened, then the law may step in and prescribe regulations to correct the alleged or threatened abuses.

* * * *

'Courts are not authorized to adjudicate questions of public policy involved in such regulations or to conduct an inquiry into questions of fact pertaining to matters of policy, but where the legislature has made such an investigation and determination, unless shown to be clearly arbitrary, erroneous or unwarranted, the courts will approve them. American Jurisprudence, Vol. II, page 823.

"The legislature is accordingly the judge when the facts are such that a given business should be regulated under the police power or when it is affected with a public interest to such an extent as to require regulation. If the regulation enforced has some reasonable relation to the legislative purpose and is not arbitrary or discriminatory, the requirements of due process are satisfied. In its last analysis, government, regardless of the form it takes, is nothing more than an instrument to preserve an ordered society. Laws are nothing more than rules promulgated by government as a means to an ordered society. It would be a strange anomaly to hold that the complexities in society had become such that the legislature was powerless to grant appropriate relief against abuses arising therefrom."

IV.

CONCLUSION.

The burden of proof falls to the one who attacks the validity of a legislative enactment. That burden has not been sustained here.

This Court takes judicial notice of general economic conditions, of the fact that the unemployed population is a necessitous class who are unable to bargain on terms of equality, the effect upon the general welfare of a large unemployed group; the desirability of promptly supplying the labor market; that the charge of an unconscionable fee affects the ability of the new job holder to readjust himself as a valuable member of society and many other matters of common knowledge and general notoriety.

Ribnik v. *McBride* should be overruled in fact, in order that the meaning of "due process" will not be in doubt.

Finally, we paraphrase the language of this Court in the *West Coast Hotel Co.* case, supra:

> "The legislature had the right to consider that its fee limiting requirement would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all the Court has to decide. Even if the wisdom of the policy be regarded as debatable and its effect uncertain, still the legislature is entitled to its judgment."

Respectfully submitted,

WALTER R. JOHNSON, Attorney General,
DON KELLEY, Assistant Attorney General,
Attorneys for Petitioner.

March 26, 1941.

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 12 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 671

V. B. KINNEY, Secretary of Labor of the State of Nebraska,

Petitioner,

vs.

STATE OF NEBRASKA; *Ex Rel.* WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER, and DAVIS SCHOOL SERVICE.

BRIEF FOR RESPONDENTS IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

WALTER GORDON MERRITT,
Attorney for Respondents.

APPELLATE LAW PRINTERS, INC., 161 Lafayette Street, N. Y.
160

BLANK PAGE

SUBJECT INDEX

	PAGE
I. Statement	1
II. Question Involved	1
III. Argument.	
This Court should not be called upon to overrule a decision of the importance of *Ribnik* v. *McBride* on a record as deficient as to facts as the one herein	2
IV. Conclusion	5

TABLE OF CASES CITED

Dry Dock Co. v. Schauffler, 303 U. S. 54, 82 Law Ed. 646	4
Nebbia v. New York, 291 U. S. 502, 78 Law Ed. 940	2–3
O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 75 Law Ed. 324	3
Ribnik v. McBride, 277 U. S. 350, 72 Law Ed. 913	1, 2, 3, 4
West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 Law Ed. 703	3

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940

V. B. KINNEY, Secretary of Labor of the State of Nebraska,
Petitioner,
vs.
STATE OF NEBRASKA, *Ex Rel.* WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER, and DAVIS SCHOOL SERVICE.

No. 671

BRIEF FOR RESPONDENTS IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

I

Statement

Substantially all of the facts disclosed by the record on this petition are fully set forth in one and one-half pages of petitioner's application (pp. 2 to 3, inclusive).

II

Question Involved.

Petitioner is asking this Court to grant a writ of certiorari in this case in order that it may determine whether or not it should overrule its decision in *Ribnik* v. *McBride*, 277 U. S. 350, 72 Law. Ed. 913, to the effect that state

legislation fixing the maximum charges of employment agencies is a violation of Section 1 of the 14th Amendment to the Constitution of the United States (Petitioner's Brief, p. 10).

III

ARGUMENT

This Court should not be called upon to overrule a decision of the importance of *Ribnik* v. *McBride* on a record as deficient as to facts as the one herein.

Because of the deficiency in this record of any facts as to the business of private employment agencies in the State of Nebraska, this Court is called upon to grant a writ of certiorari so that it might determine whether or not it should reverse its ruling in *Ribnik* v. *McBride, supra*, and hold that private employment agencies *per se* constitute a business so "affected with a public interest" that a state statute fixing their charges does not violate Section 1 of the 14th Amendment to the Constitution of the United States.

Counsel for respondents can find no decision of this Court to the effect that all businesses are subject to legislative price-fixing. It is submitted that *Nebbia* v. *New York*, 291 U. S. 502, 78 Law Ed. 940 relied upon in petitioner's brief as in effect overruling *Ribnik* v. *McBride*, does not discard the criterion of public interest or public welfare in determining the validity of price-fixing legislation, but reaffirms this criterion. From the language of Justice Roberts' opinion in the *Nebbia* case, we take the following (pp. 536-7):

> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of the courts in the application of the Fifth

> and Fourteenth Amendments is to determine *in each case whether circumstances* vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. * * * The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry *for adequate reasons* is subject to control for the public good. * * *
>
> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may *reasonably* be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. * * *." (Italics ours.)

In *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 81 Law Ed. 703, also relied upon in petitioner's brief (p. 13) Chief Justice HUGHES, speaking for the Court, said (p. 391):

> "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process."

It would seem, therefore, that whether or not the business of all private employment agencies in the State of Nebraska had, since the decision in *Ribnik* v. *McBride,* become "affected with a public interest" so as to justify this Court in overruling its decision in that case, is a question of law to be determined by this Court on the basis of facts.

While it is conceded that anyone ordinarily attacking the constitutionality of an act must bear the burden of proof of showing that under all the circumstances the act is beyond legislative power (*O'Gorman & Young* v. *Hartford Fire Insurance Company,* 282 U. S. 251, 75 Law Ed. 324), we submit that where this Court has already found in general terms that legislative price fixing for employment agencies is not a valid exercise of power, the burden

of proof to reverse this conclusion by reason of changed circumstances or otherwise rests upon the party seeking such a reversal.

The record on this petition is wholly barren of any attempt by the petitioner to meet that burden. The amended answer alleges (paragraph IV) that "The business of a private employment agency is vitally affected with a public interest" but, as stated in the majority opinion in the Nebraska Supreme Court in this case, this is a conclusion of law.

Drydock Co. v. *Schauffler,* 303 U. S. 54, 82 Law Ed. 646.

What, then, are the missing facts which, from the respondents' viewpoint, this Court should have before it in order to give intelligent consideration to the question as to whether *Ribnik* v. *McBride* should be reversed? The respondents suggest some of these:

The practicability or impracticability of fixing rigid standards of remuneration for services of varying value relating to the procurement of employment for day laborers, skilled help, white-collar groups and executives, most of which are involved in this case.

The mischiefs or evils, if any, which have grown out of the administration of employment agencies, which price-fixing is calculated to cure. In this connection consideration should be given to the existence of federal, state, charitable and labor-union agencies, established in part under authority of Congress. To what extent does the competition of these free employment agencies, which have greatly expanded since the decision in *Ribnik* v. *McBride,* eliminate and make non-existent the evil upon the existence of which the validity of legislative price fixing must depend? Since this is a state statute, there should likewise be evidence as to the operations of paid and free agencies in the State of Nebraska, with due regard to the needs of the community.

Without some such facts before it we submit that this Court cannot properly determine whether or not price-fixing regulation for this service industry in Nebraska is arbitrary or has some reasonable relation to the problem with which that state was confronted.

IV

CONCLUSION

For the reasons stated we submit that this application for a writ of certiorari should be denied.

Dated: February, 1941.

Respectfully submitted,

WALTER GORDON MERRITT,
Attorney for Respondents.

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 8 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 671

V. B. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA,

Petitioner,

v.

STATE OF NEBRASKA, *ex rel.* WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER; and DAVIS SCHOOL SERVICE,

Respondents.

BRIEF FOR RESPONDENTS

WALTER GORDON MERRITT,
Counsel for Respondents.

APPELLATE LAW PRINTERS, INC., 103 Lafayette Street, N. Y.
160

BLANK PAGE

SUBJECT INDEX.

	PAGE
STATEMENT	1
ARGUMENT	3
POINT I. Section 48-508 of the Compiled Statutes of Nebraska, 1929, as applied to the respondents, is arbitrary and a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States	3
POINT II. If this Court should hold that the present record does not justify an affirmance of the decision of the State Court, this cause should be remanded for trial on the merits	25
CONCLUSION	28
APPENDIX	
Section 48-508, Compiled Statutes of Nebraska, 1929	29

TABLE OF CASES CITED.

Abraham v. Studebaker Corporation, 113 Neb. 721, 204 N. W. 786	26
Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785	7
Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. ed. 1143	27
Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865	24
Consolidated Indemnity and Ins. Co. v. Alliance Casualty Co., 68 F. (2nd) 21	26
First National Bank of Wellston v. Conway Road Estates Co., 94 F. (2nd) 736; cert. den. Conway Road Estates Co. v. First National Bank of Wellston, 304 U. S. 578, 82 L. ed. 1541	26

PAGE

Klink v. Chicago, R. I. & P. Ry. Co., 219 F. 457..... 26
Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385..... 23
Liggett v. Baldridge, 278 U. S. 105, 73 L. ed. 204.... 7, 9
Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 56 L. ed. 877..... 24
Missouri ex rel. Wabash Railway Co. v. Public Service Commission of Missouri, 273 U. S. 126, 71 L. ed. 575..... 27
Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77..... 11
Near v. Minnesota, ex rel. Olson, 283 U. S. 697, 75 L. ed. 1357..... 6, 9
Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940 6, 8, 12, 24, 27
Newport News Shipbuilding and Dry Dock Co. v. Schauffler, 303 U. S. 54, 82 L. ed. 646..... 26
New State Ice Co. v. Liebman, 285 U. S. 262, 76 L. ed. 747..... 24
O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251, 75 L. ed. 324..... 10
Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, 81 L. ed. 109.....6, 8, 24
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 67 L. ed. 322..... 24
Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913 1, 2, 6, 7, 9, 10, 12, 14-15, 22-23, 24
Stafford v. Wallace, 258 U. S. 495, 66 L. ed. 735.... 11
Tagg Bros. and Moorhead v. United States, 280 U. S. 420, 74 L. ed. 524..... 6, 11
Townsend v. Yeomans, 301 U. S. 441, 81 L. ed. 1210 11
Tyson & Brother v. Banton, 273 U. S. 418, 71 L. ed. 718..... 10, 24
United States v. Darby Lumber Co., U. S. , 85 L. ed. 395 (February 3, 1941)..... 10
United States v. Rock Royal Cooperative, Inc., 307 U. S. 533, 83 L. ed. 1446..... 6
Van Etten v. Kosters, 48 Neb. 152, 66 N. W. 1106.. 26
Villa v. Van Schaick, 299 U. S. 152, 81 L. ed. 91.... 27
Webster v. City of Hastings, 56 Neb. 669, 77 N. W. 127..... 26
West Coast Hotel v. Parrish, 300 U. S. 379, 81 L. ed. 703..... 10, 14

PAGE

Williams v. Standard Oil Co., 278 U. S. 235, 73 L. ed. 287 ..... 6, 24
Wilson v. New, 243 U. S. 332, 61 L. ed. 735 ..... 10, 24
Charles Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 67 L. ed. 1103 ..... 7, 23
Charles Wolff Packing Co. v. Industrial Court, 267 U. S. 552, 69 L. ed. 785 7

STATUTES CITED.

Fair Labor Standards Act of 1938, 29 U. S. C. A., Sections 200, *et seq.* 9, 13
Wagner-Peyser Act, 29 U. S. C. A., Sections 49 to 49-1 incl. 15, 18

GOVERNMENT REPORTS.

Annual Report of Social Security Board—1940 ... 16, 17, 18
Labor Information Bulletin of Bureau of Labor Statistics of United States Department of Labor, December, 1937 18
Twelfth Biennial Report of Bureau of Labor and Industrial Statistics of Nebraska, 1909-1910 15
Fourteenth Biennial Report of Bureau of Labor and Industrial Statistics of Nebraska, 1913-1914 ... 15
Fifteenth Biennial Report of Bureau of Labor and Industrial Statistics of Nebraska, 1915-1916 ... 15
Twenty-seventh Biennial Report of Department of Labor of Nebraska, 1936-1938 ..... 15, 18-22
Twenty-eighth Biennial Report of Department of Labor of Nebraska, 1938-1940 ..... 15, 18-22

MISCELLANEOUS.

Planning and Administration of Unemployment Compensation in the United States by Bryce M. Stewart 15-16

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

V. B. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA,

Petitioner,

v.

STATE OF NEBRASKA, *ex rel.* WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER; and DAVIS SCHOOL SERVICE,

Respondents.

No. 671

BRIEF FOR RESPONDENTS.

Statement.

This case is before this Court on certiorari granted March 3, 1941.

Petitioner seeks a decision overruling *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913 (1928), and reversing an order of the Supreme Court of Nebraska directing the issuance of peremptory writ of mandamus (petition for certiorari, pp. 4-5, 15-16). The mandamus was to command the Secre-

tary of Labor of the State of Nebraska to issue to the Western Reference & Bond Association, Inc., and to the other respondents, licenses to operate private employment agencies for the year commencing May 1, 1940 (R. 8-9). The license was withheld because of the refusal to comply with the requirements of Section 48-508, Compiled Statutes of Nebraska, 1929, limiting the maximum compensation of an employment agency to ten per cent of the first month's salary or wages of the person for whom employment was obtained (R. 10). On motion of the agencies for judgment on the pleadings the Supreme Court of the State of Nebraska held, under the authority of *Ribnik* v. *McBride, supra*, that the part of the Statute imposing this requirement was unconstitutional in that it contravened the due process clause of the Fourteenth Amendment (R. 19).

The entire section of the statute in question appears as an appendix to this brief.

The business of the respondent employment agencies is described in the record as follows:

> "Soliciting and securing positions for clerical, executive, technical, and professional workers and * * * not * * * for common laborers, domestic servants or other classes of unskilled workers" (R. 6).

The original petition sets forth the refusal of the Secretary of Labor to issue the license on the ground that the agency would not agree to observe the price-fixing provisions of the statute and further alleges that these provisions are unconstitutional (R. 2-3). The answer of the Secretary of Labor alleges in substance that he refused the license because the agency had violated, and threatened to continue to violate, said price fixing provisions and denies that these provisions are in derogation of rights guaranteed by the Constitutions of the State of Nebraska or of the United States (R. 4-5). The answer alleges further that

the business of a private employment agency is vitally affected with a public interest and that the legislature may in the exercise of the police power regulate the maximum fees to be exacted from an employee applicant (R. 5).

The stipulation entered into between the parties (R. 7), stating the issue in the cause, provides as follows:

> "* * * that the sole and only issue for determination in the above entitled cause is the constitutionality of Sections 48-508, Compiled Statutes of Nebraska for 1929, in so far as the same fixes or limits the fees or compensation of private employment agencies."

The opinion of the State Court describes the general nature of the industry in question, the enlarged amount of subsidized competition to which it is subjected, and the hopeless impracticability of establishing a uniform fee for a valuable service and less valuable service within the limits of constitutional power (R. 18).

No evidence was taken.

ARGUMENT

POINT I.

Section 48-508 of the Compiled Statutes of Nebraska, 1929, as applied to the respondents, is arbitrary and a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

In the case of *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913, the Court had before it a New Jersey Statute, which gave the State Commissioner of Labor the power to approve or disapprove a schedule of fees proposed to be charged by any employment agency seeking a license. It

appeared that the Commissioner had rejected Ribnik's application for a license, on the ground that the fees proposed to be charged were in certain respects excessive and unreasonable.

The opening paragraph of the dissenting opinion of Mr. Justice STONE, at page 359 stated the question before the Court, as follows:

> "The question is whether a state has constitutional power to require employment agencies to charge only reasonable fees for their services to those seeking employment. As the case is presented we must take it that the New Jersey Commissioner of Labor was right in holding that Ribnik's list of fees was unreasonably high."

In the case at bar, the fee-fixing provisions of Section 48-508 of the Compiled Statutes of Nebraska, 1929, first deal with a registration fee, which is not to exceed $2.00.

The pertinent provisions of the Section, which are at issue, begin as follows:

> "No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, *'The amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer.'* " (See this brief pp. 29-30). (Emphasis supplied.)

The Section also provides that if, through no fault of the employee, he fails to remain in service with the employer, and other positions are furnished to him by the agency, then said agency shall not accept more than one fee for every three months (this brief, p. 30).

The Section also provides:

> "In the event that the position, so tendered, is not accepted by or given such applicant, said licensed person shall refund all fees requested by said applicant, other than the registration fees aforesaid within three days after demand is made therefor." (This brief, p. 30).

Apparently, the restitution required by the provision just above quoted must be made even if the employee arbitrarily or capriciously refused to accept a satisfactory position procured for him by the agency.

The Section also provides:

> "If an employee furnished fails to remain one week in a situation through no fault of the employer, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employer upon demand. If the employment furnished the applicant does not continue more than one week, through no fault of the employee, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employee upon demand" (this brief, p. 31).

Thus, it appears that the Act imposes a maximum limit on the fees to be charged, and forbids the exaction of any other "compensation or reward", regardless of the amount of service rendered, or the moneys expended in order to place the employee. Moreover, if the employee arbitrarily or capriciously rejects the position offered, any fee paid beyond the registration fee must be returned. If the employee remains less than a week in the job, whether due to

his own fault or the fault of his employer, the agency is required to repay all fees in excess of the registration fee, either to the employee or his employer, as the case may be.

We submit that this Statute upon its face—and particularly as applied to executive, technical and professional employment—is far more arbitrary and unreasonable than was the statute involved in the *Ribnik* case, and is clearly in violation of the due process provisions of the Fourteenth Amendment. In fact, there is little in the dissenting opinion of *Ribnik* v. *McBride* to support the validity of such an arbitrary act.

The petitioner, realizing that the case of *Ribnik* v. *McBride* presents a barrier to his contentions, frankly asks this Court to treat that decision as overruled.

The *Ribnik* case has stood for twelve years. It has been recognized as established law by citation and discussion in many subsequent cases in this Court and has never been disapproved or overruled by this Court.

Williams v. Standard Oil Co., 278 U. S. 235, 239, 73 L. ed. 287, 308;

Tagg Bros v. *United States*, 280 U. S. 420, 438-9, 74 L. ed. 524, 534;

Near v. *Minnesota Ex Rel. Olson*, 283 U. S. 697, 707-8, 75 L. ed. 1357, 1363;

Nebbia v. *New York*, 291 U. S. 502, 536-7, 78 L. ed. 940, 957;

Old Dearborn Distributing Co. v. *Seagram-Distillers Corporation*, 299 U. S. 183, 192, 81 L. ed. 109, 118;

United States v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 570, 83 L. ed. 1446, 1468.

Since the petitioner is asking this Court to overrule this decision, the problem presented cannot be met solely by analysis of decisions before and since the *Ribnik* case. It involves a fresh consideration of the effect of our written

Constitution in protecting our free economy and individual rights against legislative invasion.

It is submitted, notwithstanding the fact that the case of *Adkins* v. *The Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, has been overruled, that the fundamental principle laid down therein is still sound. That principle was stated at page 546 as follows:

> "But freedom of contract is nevertheless the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

This language is quoted with approval in *Chas. Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 534, 67 L. ed. 1103, 1108, and *Chas. Wolff Packing Co.* v. *Industrial Court*, 267 U. S. 552, 566, 69 L. ed. 785, 790.

In the first *Wolff Packing* case it is stated that before such legislation can be upheld it must appear that the industry must "have come to hold such a peculiar relation to the public that this is superimposed upon them" (p. 535).

The Chief Justice, in his dissenting opinion in the *Adkins* case, referred to the necessity of "pricking out a line" as to the "boundary of the police power" in such cases. Both Mr. Justice SUTHERLAND in the prevailing opinion and Mr. Justice STONE in the dissenting opinion in the *Ribnik* case applied the test that whether a business is affected with a public interest turns "upon the existence of conditions peculiar to the business under consideration" (277 U. S. 355-6, 362, 72 L. ed. 915, 918).

Again, in *Liggett* v. *Baldridge*, 278 U. S. 105, 111, 73 L. ed. 204, 208, the Court referred to the fact that regulations impairing freedom of contract must be declared unconstitutional, unless "justified as a valid exercise of the police power."

In the case of *Nebbia* v. *New York*, 291 U. S. 502, 78 L. ed. 940, which involved the Milk Control Act of the State of New York with its price-fixing features, this Court said, at page 523:

> "Under our form of Government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference."

In the case of *Old Dearborn Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 192, 81 L. ed. 109, 118, this Court said:

> "Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments. Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 429, 71 L. ed. 718, 722, 47 S. Ct. 426, 58 A. L. R. 1236; Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 537, 67 L. ed. 1103, 1109, 43 S. Ct. 630, 27 A. L. R. 1280; Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A. L. R. 1327; Williams v. Standard Oil Co., 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A. L. R. 596; New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 74 52 S. Ct. 371. These cases hold that, with certain exceptions, which need not now be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them."

We, therefore, submit that special circumstances creating exceptions must first be shown to support the validity of any such drastic regulation as price-fixing. Such circumstances, or lack of such circumstances, in some cases may appear from the inherent nature of the subject matter so regulated, while in other cases the burden is on him who

challenges the validity of the act. For illustration, the contention that a law is unconstitutional because it is confiscatory must be supported by evidence to that effect. On the other hand, if it appears that the attempted regulation extends into a field which, by its inherent nature, or as a matter of law, is beyond the reach of constitutional power, no outside evidence is required. See *Liggett Co. v. Baldridge,* 278 U. S. 105, 78 L. ed. 204. In the case at bar, we submit that a presumption naturally arises from the previous decision of the Court in the *Ribnik* case, that legislative price-fixing, as applied to employment exchanges, is arbitrary and unreasonable and that the burden of overcoming that presumption rests upon the petitioner in this case.

The difference between fixing maximum charges for commodities and maximum charges for services is not one to be ignored. On the whole, we submit that this Court—as in the past—should be cautious in recognizing legislative power to fix maximum charges for personal services, for if the power to fix maximum wages is added to the power to fix minimum wages, there is little left of the personal liberty to make contracts, which is both a right of liberty and property. Can it be said that fixing maximum fees for securing positions for executive, technical and professional workers is any more subject to legislative control than are the salaries of such classes of workers? These occupations involve a class of people who have not been thought to be in need of special protection from exploitation. The Fair Labor Standards Act of 1938 (Section 13) exempts executive, administrative and professional groups (29 U. S. C. A. Section 213).

As was said by this Court, through the Chief Justice in *Near* v. *Minnesota,* 283 U. S. 697, 708, 75 L. ed. 1357, 1363,

> "The power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages."

The important cases in this Court dealing with legislative power to fix maximum compensation for personal services are few in number, and easily distinguishable from the case at bar, by reason of special circumstances.

In *Tyson & Brother* v. *Banton*, 273 U. S. 418, 71 L. ed. 718, and *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913, this Court struck down, attempts at legislative price-fixing for personal services. In *Wilson* v. *New*, 243 U. S. 332, 61 L. ed. 735, the Court disclaimed such power except to meet the temporary emergency of a threatened railroad strike.

In a different class are Minimum Wage Laws.

West Coast Hotel Company v. *Parrish*, 300 U. S. 379, 81 L. ed. 703;
United States v. *Darby Lumber Co.*, — U. S. —, 85 L. ed. 395, Feb. 3, 1941.

In *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 75 L. ed. 324, this Court upheld a statute of the State of New Jersey forbidding the insurer to allow its agents any commission "in excess of a reasonable amount" or in excess of that "allowed to any one of its local agents." The Legislature did not even fix the rate of commission to be charged, but, this Court, in a five to four decision, at page 257, laid stress upon the fact that the insurance business was "so far affected with the public interest that the State may regulate the rates. German Alliance Insurance Co. v. Lewis, 233 U. S. 389." The Court was dealing with an industry which traditionally was subjected to far-reaching regulations of various kinds, including rate-fixing. So far was this true that the business was quite generally carried on under the supervision of a superintendent of insurance, or some corresponding state official. The Court, accordingly, held the statute to be valid because "the agent's compensation, being a percentage of the premium, bears a direct relation to the rate charged to the insured" (p. 257).

In the case of *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420, 74 L. ed. 524, the Court dealt with a provision of the Packers and Stockyard Act, under which the Secretary of Agriculture determined just and reasonable rates and charges by "market agencies" of stockyards. The case should be read in the light of *Stafford* v. *Wallace,* 258 U. S. 495, 66 L. ed. 735, as to the character of the industry in question. The Court held in the *Tagg Bros.* case that the statute and the orders issued by the Secretary of Agriculture, fixing charges by market agencies, was valid, but laid particular emphasis upon the fact that these agencies had a monopoly and were accustomed to fix prices by agreement among themselves. Upon this point, the Court said, at pages 438-9:

> "There is nothing in the nature of monopolistic personal services which make it impossible to fix reasonable charges to be made therefor; * * *.
>
> "Plaintiffs perform an indispensable service in the interstate commerce in livestock. They enjoy a substantial monopoly at the Omaha stockyards. They had eliminated rate competition and had substituted therefor rates fixed by agreement among themselves, without consulting the shippers and others who pay the rates. They had bound themselves to maintain uniform charges regardless of the differences in experience, skill and industry. The purpose of the regulation attacked is to prevent their service from thus becoming an undue burden upon, and obstruction of, that commerce. (Citing cases.)"

Thus far, and thus far only, has this Court gone in fixing maximum charges for personal services.

The case of *Townsend* v. *Yeomans,* 301 U. S. 441, 81 L. ed. 1210, which sustained a statute fixing charges to be made by tobacco warehouses, is not a case involving personal services, in the sense in which we use the term, but is more akin to the decision in *Munn* v. *Illinois,* 94 U. S. 113, 24 L. ed. 77, involving rates to be charged by grain elevators.

The question, therefore, arises as to whether this Court at this time is prepared to narrow the field of constitutional liberty and enlarge the area of statutory regimentation by upholding a statute which fixes the maximum fees which may be charged by employment exchanges. To overrule the *Ribnik* decision would be to take a long step in this direction.

In the case of employment exchanges, and particularly those providing employment for executives, technicians and professional men, services rendered are not capable of standardization without arbitrariness, as has already been found by this Court, and as was found in effect by the Nebraska Supreme Court in the case at bar. In referring to previous cases in this Court, including the *Ribnik* case, the majority opinion by Mr. Justice ROBERTS in *Nebbia* v. *New York*, 291 U. S. 502, 78 L. ed. 940, states at pages 536-537:

> "These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect."

Legislative limitation on maximum fees for employment agencies is certain to react unfavorably upon those members of the community for whom it is most difficult to obtain jobs.

This argument showing the impracticability and injustice of such regulation is entitled to special consideration in an industry which is subject to subsidized competition from free public employment exchanges in almost every section of the nation, so that the evil of excessive charges, whatever may have been the extent of its existence in the past, can no longer conceivably exist. Surely no one wishes unnecessarily to destroy the liberty of people to serve and be served on terms agreed upon or to reduce unnecessarily the circle of constitutional liberty.

We proceed, therefore, to elaborate these points.

An employment exchange may serve all classes of people, including those capable of service for which there is a great demand, and those having no particular bent who may approach the class of unemployables. The clerical, executive, technical and professional groups, more than some others, elude standardization. If there is a fixed maximum fee, and no opportunity to recover disbursements, the tendency of the employment exchange will be to serve those for whom jobs may be secured with little effort, and to refrain from spending the extra amount of time, energy, resourcefulness and money which may be necessary to secure work for those whom it is difficult to place. Under the present emergency, it is easy to secure work for a toolmaker, because the country is in great need of toolmakers, but the fee to be collected by the agency for the easy task of placing the toolmaker will be ten per cent of the high monthly wages of that toolmaker. On the other hand, it is still difficult, in view of the great amount of unemployment, to secure employment for unskilled men, but, under the terms of the Nebraska Statute, if an agency spends a great deal of time, effort and money to find employment for such men, it will receive therefor only ten per cent of the monthly wages of the unskilled craftsman—or less compensation for more work. The same argument applies to handicapped or elderly employees. It is difficult to place such men, and when they are placed their actual wages are small. A statute which operates in such a way is essentially arbitrary and unreasonable, and is against the public interest, because it decreases the opportunities of employment for those who are particularly in need of such a service.

Legislative recognition of the necessity of flexible provisions in respect to handicapped employees, if arbitrariness is to be avoided, is to be found in Section 14 of the Fair Labor Standards Act of 1938, 29 U. S. C. A. Sec-

tion 214, dealing with the minimum wages of learners, apprentices and handicapped workers, and in the Washington minimum wage law involved in the decision of this Court in *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, 387, 81 L. ed. 703, 706. We submit moreover that the general application of such laws unqualifiedly to professional and executive workers would not be sustainable as a valid exercise of constitutional power.

Let it also be remembered that time is of the essence for those seeking employment, and for them it is far cheaper to pay extra fees to cover extra speed, energy, and cost than to wait weeks for a result. Perhaps, it is that fact alone which has kept the private agency alive in the face of subsidized competition. We submit that regulations which destroy flexibility and efficiency and prevent adequate service in such activities are arbitrary and void and detrimental to public welfare.

Nor is it to be forgotten that the same Act gives the person served by the agency the power, by wanton caprice, to escape payment for services fully rendered, by requiring the agency to return fees for such rendered service whenever the employee arbitrarily decides not to accept the "delivered goods". It also permits the employee arbitrarily to terminate the employment short of a week, and thus prevent the agency from receiving or retaining compensation in excess of the $2.00 registration fee. We submit that these arbitrary restrictions are inseparable parts of the fee fixing provisions and emphasize the invalidity of this act as applied to employment exchanges which limit their business to clerical, executive, technical and professional workers. Are these classes to be treated as wards of the state by denying them the right of freedom of contract in such matters?

The lack of any evil or mischief to be remedied by any such drastic and arbitrary legislation emphasizes the infirmity of these provisions. Since the time when the *Rib-*

nik case was decided, public employment exchanges have grown apace. The public reports in respect to employment exchanges referred to by the petitioner, and referred to in previous dissenting opinions in this Court, are largely out of date. They do not reflect current conditions as affected by the present degree of competition from free public agencies subsidized by the State and Federal governments.

It is significant that while the Twelfth (1909-1910), the Fourteenth (1913-1914) and the Fifteenth (1915-1916) Biennial Reports of the Bureau of Labor of the State of Nebraska quoted in petitioner's brief (pages 52-54) refer to certain alleged abuses by private employment agencies, the Twenty-seventh (1936-1938) and the Twenty-eighth (1938-1940) Biennial Reports of the Nebraska Department of Labor make no reference to such abuses although both reports deal with private employment agencies. This apparent disappearance of these abuses may well be explained by the recent growth in the activities of the Federal-State employment agencies in Nebraska as set forth later in this brief.

In 1933 the Wagner-Peyser Act, 29 U. S. C. A., Secs. 49 to 49-1 inclusive, was passed, providing for the establishment and maintenance of a national system of public employment offices, under the direction of the United States Employment Service. This Act provides that such sums shall be appropriated by Congress as may be deemed necessary for the maintenance of these public employment agencies, to be apportioned among the several States, and that no payment shall be apportioned to any State until an equal sum has been made available by that State (Section 49-d).

In *Planning and Administration of Unemployment Compensation in the United States,* by Bryce M. Stewart, published by Industrial Relations Counselors, Inc. of New York, in 1938, we find the following:

"At the time of the passage of the Wagner-Peyser Act twenty-four states and the District of Columbia were maintaining employment services, many of which were on only a nominal basis, and there were about 135 state employment offices in operation. By December 31, 1936, thirty-seven states had affiliated with the United States Employment Service, one state was in the process of affiliating, eight others had accepted the Wagner-Peyser Act but taken no further action, and only two states, Kansas and Montana, were not affiliated.

• • •

"By the middle of 1937 forty-three states had affiliated; three had accepted the Wagner-Peyser Act but taken no further action; one was still in the process of affiliating; and one other, Montana, was not affiliated and had taken no action." Chapter VIII, page 206.

The 1940 Annual Report of the Social Security Board states, at page 69:

"The establishment of the Unemployment Compensation Program has resulted in an increase in the use of public employment services by employers and workers who did not previously use them extensively, especially in connection with 'white collar' jobs and skilled labor."

In the same report it appears that on June 30, 1940 there were 1,492 local offices of State Employment Services and, in addition, 3,115 points at which itinerant service was provided. The active file of these employment offices showed the registration of 5.7 million job seekers. During the year these offices received 16.2 million applications for work, including new applications and renewed applications, and placements were more than 3.5 million. Nearly three million complete placements were in private employment

of which 1.5 million were in "regular private employment," that is, in employment expected to last more than a month. Nearly 700,000 placements were made in skilled and semi-skilled jobs. Placements in white collar jobs numbered some 415,000 of which 224,000 were in sales jobs, 156,000 were in clerical jobs and nearly 35,000 were in professional and technical jobs (page 69). In addition to these complete placements the offices participated in 1.1 million supplementary placements, that is, in placements in which the service was instrumental in bringing the employer and worker together, although the service did not itself perform all the steps in the placement. During the year members of employment service staffs made 2.1 million visits to employers to explain the facilities of the service and inquire about job openings. Services for the placement of teachers were established several years ago on a centralized basis in five states, including Nebraska (pages 69, 70).

For the fiscal year ended June 1939, Congress appropriated $1,950,000 and for the fiscal year ended June 1940, $3,480,000, to support these free public employment agencies. Under the requirement of the law the State governments were obliged to contribute an equal amount for the support of these governmental agencies. In addition to all of these appropriations each State receives a subsidy from the Social Security Fund for the support of public employment agencies and furthermore the postage on all mail sent out from Federal-State employment offices is paid for by the Social Security Board.

The Federal-State offices through their outside contact men and women and otherwise try to interest employer and employee. They advertise in the newspapers. To be eligible for unemployment insurance the unemployed must register with a public agency. This special competition given the private agencies by the free public agencies is further emphasized by the following statement on page 2

of the *Labor Information Bulletin* of December 1937, issued by the Bureau of Labor Statistics of the United States Department of Labor:

> "The public employment offices as a part of the State unemployment-compensation system have a big part to play. The States require that unemployment compensation shall be paid through public employment offices, and to be eligible for benefit payments the unemployed worker must register at such an office and fulfill certain requirements of the law."

Now there are Federal-State Employment Offices in all the States and in the District of Columbia, Alaska and Hawaii (Social Security Board Annual Report, 1940, p. 186).

The part that this competition plays in Nebraska appears also in the Twenty-seventh and Twenty-eighth Biennial Reports of the Department of Labor of the State of Nebraska.

As of June 30, 1940, there were twenty State-Federal employment offices in the State of Nebraska (Social Security Board Report, 1940, p. 186). The amount apportioned for the Nebraska offices under the Wagner-Peyser Act for the fiscal year 1939-1940 was $37,570.80 (Social Security Board Report, 1940, p. 164). However, this sum, in addition to the equal sum which the State must provide under the Wagner-Peyser Act, apparently represents a small proportion of the money spent in Nebraska in connection with the operation of these Federal-State employment offices. On page 18 of the Twenty-seventh Biennial Report of the Department of Labor of the State of Nebraska, June 1, 1936, to December 1, 1938, it is stated:

> "This law [referring to an Act known as the Unemployment Compensation Law passed at the

1937 session of the Nebraska Legislature] was so framed as to conform with the requirements of Title III and Title IX of the Federal Social Security Act. Under the provisions of this act, due to the fact that all persons applying for Unemployment Compensation benefits must register for work with the Nebraska State Employment Service, funds are provided by the Unemployment Compensation Bureau of the Social Security Board to supplement State and Federal funds matched under the Wagner-Peyser Act, in order that an adequate State employment service may be maintained."

On page 21 of the Twenty-eighth Biennial Report of the Department of Labor of the State of Nebraska, December 1, 1938 to December 1, 1940, it is stated:

"In order to expand the organization [referring to the Nebraska State Employment Service] to meet the requirements for handling this additional work monies were granted by the Social Security Board to the employment service to meet the increased cost of operation. By far the largest part of the cost of operation is met by these grants. For the period July 1, 1939, to December 31, 1940, the ratio is as follows:

Local (County and city)		2%
State (State appropriation to be matched by Wagner-Peyser Fund)		14%
Wagner-Peyser Funds	15%	
Grants from Social Security Board	69%	
Total Federal Money		84%
		100%"

Economic pressure is brought to bear on employee and employer alike to utilize the public employment agencies. The pressure on the employer is set forth on page 18 of the Twenty-seventh Biennial Report of the Department of Labor of the State of Nebraska:

> "It, stands to reason that a fair percentage of the applicants placed will necessarily be claimants for benefits and in this measure the Nebraska State Employment Service will protect the employers' reserves under the Unemployment Compensation fund. Since the Nebraska State Employment Service may in this way protect the employers' reserves, a constant effort has been made during the year 1938 to inform all employers of the part which the Employment Service will play in the protection of their reserves and they have been encouraged to use the Employment Service for the purpose of filling any positions they have vacant in their organizations. By the operation of the system of employers using the Employment Service to the greatest extent possible, they may co-operatively assist themselves in protecting their reserves."

The pressure on the unemployed is stated on page 20 of the Twenty-eighth Biennial Report of the Department of Labor of the State of Nebraska:

> "As a condition to qualification for benefits the act [referring to the Nebraska State Unemployment Compensation Law passed by the 1937 session of the legislature] provides that the employee must register with the employment service and accept suitable employment if available. He is entitled to benefits only in case it is impossible to find other employment. This is the only effective provision which makes it possible to ascertain willingness to work. It would be difficult to attempt to administer unemployment

compensation except through public employment offices. There must, accordingly, be the closest possible connection between the employment offices and the administration of unemployment compensation."

The results of this competition also appear in the official reports. During the fiscal year 1939-1940 the public employment offices in Nebraska received 119,261 applications for employment and made 34,779 placements (Social Security Board Report, 1940, p. 187). The Twenty-eighth Biennial Report of the Nebraska Department of Labor, page 16, gives the following figures as to the activities of the Nebraska State Employment Service from December, 1938 to November, 1940, inclusive:

New applications and renewals	231,507
Total placements	72,453
Private placements	36,738
Public placements	35,715
Farm placements	4,642
Teacher placement division	487

The names of three of the respondents herein indicate that they are teachers agencies. The competition they face in Nebraska from the Public Employment Service is revealed at pages 22 and 23 of the Twenty-eighth Biennial Report of the Nebraska Department of Labor, from which we quote:

"Three years have passed since the establishment of the Teacher Placement Division of the Nebraska State Employment Service, and each year has seen a decided increase in the service rendered to the teachers and school officials in the State. Practically all of the schools and colleges in the state have cooperated in this service.

> "During the past two years a total of 482 placements has been made, showing a gain each year of approximately one-third over each preceding year. * * *
>
> "The average active file of teachers seeking employment or advancement in 1940 was 1,109, which represents an increase of approximately twenty per cent over 1939 and ninety-two per cent over the first year of operation. The total number requesting consideration for positions thus far in 1940 is 2,065. Since January, 1940, 1,139 vacancies have been reported by school officials.
>
> * * * * *
>
> "This service is available to every school district, city, town and rural, in the state. Candidates may also use it for the purpose of having their credentials compiled for future use or made available to the placement bureaus of their own colleges or placement divisions in other states."

Nothing appears in the record to overcome the presumption created as to the results of such inexorable economic forces. Because of this increasing competition of the public employment agencies, as well as the increasing number of charitable, labor union and employer association employment agencies, any tendency of the past toward excessive fees by private employment agencies must have come to an end. Those private agencies which have not been put out of business by competition, publicly subsidized, can no longer hope to collect excessive fees.

Mr. Justice STONE in the dissenting opinion in *Ribnik* v. *McBride*, 277 U. S. 350, at page 360, stated that price regulation was within a state's power

> "whenever any *combination of circumstances* seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might *reasonably* anticipate serious consequences to the community as a whole." (Italics ours.)

At pages 373-374 in the same opinion he further said:

> "To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered."

This statement seems to be in complete harmony with the statement of this Court in *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

In *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 535-6, 67 L. ed. 1103, 1108, the Court deals, in detail, with the classification of industries which may be subject to price regulation, and points to the fact that this includes a group of occupations which may be subject to such changing circumstances as to result in their being transferred to the group which is affected with the public interest. On this point, the Court said:

> "Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some Government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them."

and again:

> "The circumstances of its alleged change from the status of private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry."

This opinion in the *Wolff* case has been repeatedly relied upon by this Court as stating the fundamental principles involved.

Tyson & Bro. v. *Banton,* 273 U. S. 418, 431, 71 L. ed. 718, 723;
Ribnik v. *McBride,* 277 U. S. 350, 355, 72 L. ed. 913, 915;
Williams v. *Standard Oil Co.,* 278 U. S. 235, 239; 73 L. ed. 287, 308;
New State Ice Co. v. *Liebman,* 285 U. S. 262, 277, 76 L. ed. 747, 753;
Nebbia v. *New York,* 291 U. S. 502, 536, 78 L. ed. 940, 956.
Old Dearborn Distributing Co. v. *Seagram-Distillers Corp.,* 299 U. S. 183, 192, 81 L. ed. 109, 118;

Other cases indicate that the limits of constitutional power in cases of this character may hinge on changing conditions in respect to the evil or emergency justifying such a drastic intrusion on liberty.

Wilson v. *New,* 243 U. S. 332, 61 L. ed. 755;
Block v. *Hirsh,* 256 U. S. 135, 65 L. ed. 865;
Marcus Brown Holding Co. v. *Feldman,* 256 U. S. 170, 65 L. ed. 877;
Pennsylvania Coal Co. v. *Mahon,* 260 U. S. 393, 67 L. ed. 322.

As applied to the case at bar, it seems apparent that if the "peculiar relation to the public" of this industry was not such as to subject it to price-fixing regulation in 1928, it certainly is even less so today, by reason of the greater prevalence of subsidized governmental employment exchanges, which, by and large, prevent any company from successfully charging excessive fees.

The findings by the Supreme Court of Nebraska, confirming these contentions, include the following (R. 17-18):

> "While for many years employment agencies have been created by many states, civic and labor organizations, to which those unemployed might resort without charge to them, this field has been vitally enlarged upon by both the federal governme[illegible] and the states, and such other organizations as previously mentioned, to such extent that it is apparent that the business of an employment agency is distinctively one of a highly competitive nature. An attempt to establish a uniform fee for a valuable service and less valuable service, without the expense of overhead, would seem to be hopelessly impracticable, within the limits of constitutional rights.
>
> The relator is engaged in a beneficial business. Constituting part of its property are services rendered in obtaining employment. One is not obligated, nor is it compulsory, to employ relator, and the person seeking to avail himself of such services is at liberty to reject them, if the terms of the contract for compensation are not satisfactory."

POINT II.

If this Court should hold that the present record does not justify an affirmance of the decision of the State Court this cause should be remanded for trial on the merits.

Should this Court be of the opinion that the statute in question is not invalid on the present showing, the proceeding in the Court below should not be ordered dismissed but this cause should be remanded for trial on the facts. All that the petitioner herein sought by his petition for certiorari was that this Court reverse the decree

of the Supreme Court of the State of Nebraska granting mandamus on a motion for judgment on the pleadings made by the respondent in the Court below (petition for certiorari, p. 5). There is no request that this Court grant the petitioner judgment on the pleadings dismissing the petition in the Court below. A motion for judgment on the pleadings is in the nature of a demurrer involving only questions of law raised on the face of the pleadings, where proof of facts is not permissible.

First National Bank of Wellston v. *Conway Road Estates Co.*, 94 F. (2nd) 736 (C. C. A. 8th Cir. 1938), certiorari denied *Conway Road Estates Co.* v. *First National Bank of Wellston*, 304 U. S. 578, 82 L. ed. 1541;

Consolidated Indemnity & Ins. Co. v. *Alliance Casualty Co.*, 68 F. (2nd) 21 (C. C. A. 2nd Cir. 1933);

Klink v. *Chicago, R. I. & P. Ry. Co.*, 219 F. 457 (C. C. A. 8th Cir. 1915);

Van Etten v. *Kosters*, 48 Neb. 152, 66 N. W. 1106;

Webster v. *City of Hastings*, 56 Neb. 669, 77 N. W. 127;

Abraham v. *Studebaker Corporation*, 113 Neb. 721, 204 N. W. 786.

It is true that a motion for judgment on the pleadings admits either directly or impliedly the truth of all well pleaded facts in the pleading of the opposing party but it does not admit conclusions of the pleader. The allegation in the answer that the business of a private employment agency in Nebraska is vitally affected with a public interest is a conclusion of law and is therefore not admitted.

Newport News Shipbuilding & Dry Dock Co. v. *Schauffler*, 303 U. S. 54, 82 L. ed. 646.

Likewise, if it be determined that the statute cannot be held to be invalid in the absence of outside evidence, the allegation in the petition in the Court below to the effect that it is unconstitutional as a violation of the due process clause of the Fourteenth Amendment is an averment to be supported by proof of appropriate facts.

In *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 81 L. ed. 1143, Mr. Chief Justice HUGHES said, at page 353:

> "Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown."

In the majority opinion in *Nebbia* v. *New York,* 291 U. S. 502, 78 L. ed. 941, it is stated, at page 525:

> "* * * And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under some other circumstances, *because the reasonableness of each regulation depends upon the relevant facts.* * * *" (Italics ours.)

This is not a case where a trial has been held on the merits and the respondents here failed to offer certain necessary proof. They should not be deprived of their day in Court where they have raised only a question of law by motion.

This Court has held that where justice requires it, a cause may be remanded to take proof of further facts.

> *State of Missouri ex Rel. Wabash Railway Company* v. *Public Service Commission of Missouri,* 273 U. S. 126, 71 L. ed. 575;
>
> *Villa* v. *Van Schaick,* 299 U. S. 152, 81 L. ed. 91.

CONCLUSION

We submit, for the reasons above set forth, that the *Ribnik* case should not be overruled, and the decision of the Supreme Court of Nebraska should not be reversed, but in the event that this Court should find that such a conclusion cannot be reached without additional proof of pertinent facts, the cause should not be dismissed but should be remanded to the State Court for trial.

Respectfully submitted,

WALTER GORDON MERRITT,
Counsel for Respondents.

APPENDIX

Section 48-508, Compiled Statutes of Nebraska 1929:

"A registration fee not to exceed two dollars may be charged by such licensed agency when such agency shall be at actual expense in advertising such individual applicant, or in looking up the reference of such applicant. In all such cases a complete record of such references shall be kept on file which record shall, during all business hours, be open for the inspection of the secretary of labor, the chief deputy secretary of labor, or any other inspector appointed by the secretary of labor to make such inspection, and upon demand shall be subject to the inspection and examination by the applicant. For such registration fee a receipt shall be given to said applicant for help or employment, giving name of such applicant, date of payment and character of position or help applied for. Such registration fee shall be returned to said applicants on demand, after thirty days and within sixty days from date of receipt, less the amount that has been actually expended by said licensed agency for said applicant, and an itemized account of such expenditures shall be presented to said applicant on request at the time of returning the unused portion of such registration fee, provided no position has been furnished by said licensed agency to and accepted by said applicant. No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of

which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all moneys paid to or to be paid or earned by said applicant, for the . st month's service growing out of said employment furnished by said employer. Provided, however, that if through no fault of said applicant or employee, he fails to remain in service with said employer and other positions or places of employment are furnished to said applicant by said licensed agency, then said licensed agency shall not accept, collect or charge more than one fee every three months,' but the further fee aforesaid shall not be received by such licensed person before the applicant has been tendered a position by said licensed person. In the event that the position, so tendered, is not accepted by or given such applicant, said licensed person shall refund all fees requested by said applicant, other than the registration fees aforesaid within three days after demand is made therefor. No such licensed person shall send out any applicant for employment without having obtained a BONA FIDE order therefore, and if it shall appear that no employment of the kind applied for existed at the place where said applicant was directed, said licensed person shall refund to such applicant within five days after demand, any sum paid by such applicant for transportation in going to and returning from said place and all fees paid by said applicant. In addition to the receipt provided to be given for registration fee it shall be the duty of such licensed person to give, to every applicant for employment from whom other fee or fees shall be received, an additional receipt, in which shall be stated the name of such applicant, the date and amount of such other fees; and to every applicant for help from whom other fee or fees shall be received, an additional receipt, stating the name and address of said applicant, the date and amount of such other fee or fees and the kind

of help to be provided. All receipts shall have printed on the back thereof, in the English language, the name and address of the state secretary of labor and the chief deputy secretary of labor. Every such licensed person shall give to every applicant for employment, a card or printed paper containing the name of the applicant, the name and address of such employment agency, and the written name and address of the person to whom the applicant is sent for employment. If an employee furnished fails to remain one week in a situation, through no fault of the employer, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employer upon demand. If the employment furnished the applicant does not continue more than one week, through no fault of the employee, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employee upon demand (1921 p. 704; C. S. 1922, 7734)."

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 671.—October Term, 1940.

O. M. Olsen, Secretary of Labor of the State of Nebraska, Petitioner,
vs.
State of Nebraska, *ex rel.* Western Reference & Bond Association, Inc., et al.

On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[April 28, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

In reliance upon *Ribnik* v. *McBride*, 277 U. S. 350, the Supreme Court of Nebraska held, one judge dissenting, that a statute of that state fixing the maximum compensation which a private employment agency might collect from an applicant for employment[1]

[1] Neb. Comp. Stat. 1929, § 48-508:

"Private Employment Agencies, Registration Fee. A registration fee not to exceed two dollars may be charged by such licensed agency when such agency shall be at actual expense in advertising such individual applicant, or in looking up the reference of such applicant. In all such cases a complete record of such references shall be kept on file which record shall, during all business hours, be open for the inspection of the secretary of labor, the chief deputy secretary of labor, or any other inspector appointed by the secretary of labor to make such inspection, and upon demand shall be subject to the inspection and examination by the applicant. For such registration fee a receipt shall be given to said applicant for help or employment, giving name of such applicant, date of payment and character of position or help applied for. Such registration fee shall be returned to said applicants on demand, after thirty days and within sixty days from date of receipt, less the amount that has been actually expended by said licensed agency for said applicant, and an itemized account of such expenditures shall be presented to said applicant on request at the time of returning the unused portion of such registration fee, provided no position has been furnished by said licensed agency to and accepted by said applicant. No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer. *Provided, however,* that if through no fault of said applicant or employee, he fails to remain in service with said employer

was unconstitutional[2] under the due process clause of the Fourteenth Amendment. 138 Neb. 574, 293 N. W. 393. The case is here on a petition for certiorari which we granted because of the importance of the constitutional question which was raised.

The action is for a peremptory writ of mandamus ordering petitioner, Secretary of Labor of Nebraska, to issue a license to the relator[3] to operate a private employment agency for the year commencing May 1, 1940. The license was withheld because of relator's refusal to limit its maximum compensation, as provided by

---

and other positions or places of employment are furnished to said applicant by said licensed agency, then said licensed agency shall not accept, collect or charge more than one fee every three months,' but the further fee aforesaid shall not be received by such licensed person before the applicant has been tendered a position by said licensed person. In the event that the position, so tendered is not accepted by or given such applicant, said licensed person shall refund all fees requested by said applicant, other than the registration fees aforesaid within three days after demand is made therefor. No such licensed person shall send out any applicant for employment without having obtained a *bona fide* order therefor, and if it shall appear that no employment of the kind applied for existed at the place where said applicant was directed, said licensed person shall refund to such applicant within five days after demand, any sum paid by such applicant for transportation in going to and returning from said place and all fees paid by said applicant. In addition to the receipt provided to be given for registration fee it shall be the duty of such licensed person to give, to every applicant for employment from whom other fee or fees shall be received, an additional receipt, in which shall be stated the name of such applicant, the date and amount of such other fees; and to every applicant for help from whom other fee or fees shall be received, an additional receipt, stating the name and address of said applicant, the date and amount of such other fee or fees, and the kind of help to be provided. All receipts shall have printed on the back thereof, in the English language, the name and address of the state secretary of labor and the chief deputy secretary of labor. Every such licensed person shall give to every applicant for employment, a card or printed paper containing the name of the applicant, the name and address of such employment agency, and the written name and address of the person to whom the applicant is sent for employment. If an employee furnished fails to remain one week in a situation, through no fault of the employer, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employer upon demand. If the employment furnished the applicant does not continue more than one week, through no fault of the employee, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employee upon demand."

[2] The court upheld those provisions of the statute under § 3, Art. I of the Nebraska Constitution which provides that "No person shall be deprived of life, liberty, or property, without due process of law." See Art. XV, § 9.

[3] The petition in mandamus was filed by respondent Western Reference & Bond Assn., Inc. The other respondents are Mills Teachers Agency, Thomas Employment Service, Co-Operative Reference Co., Marti Reference Co., Watts Reference Co., Cornhusker Teachers Bureau, Grace Boomer, and Davis School Service, who intervened in the action and challenged the constitutionality of the act. Their petition of intervention stated that they, as well as the relator, confine their business "to soliciting and securing positions for clerical, executive, technical and professional workers, and do not engage in the business of securing placements for common laborers, domestic servants or other classes of unskilled workers." That seems to be conceded.

the statute, to ten per cent of the first month's salary or wages of the person for whom employment was obtained. The petition in mandamus challenged the constitutionality of those provisions of the act.[4] The answer sought to sustain them by alleging that the business of a private employment agency is "vitally affected with a public interest" and subject to such regulation under the police power of the state. The relator's motion for judgment on the pleadings was sustained and it was ordered that a peremptory writ of mandamus should issue.

We disagree with the Supreme Court of Nebraska. The statutory provisions in question do not violate the due process clause of the Fourteenth Amendment.

The drift away from *Ribnik* v. *McBride, supra*, has been so great that it can no longer be deemed a controlling authority. It was decided in 1928. In the following year this Court held that Tennessee had no power to fix prices at which gasoline might be sold in the state. *Williams* v. *Standard Oil Co.*, 278 U. S. 235. Save for that decision and *Morehead* v. *Tipaldo*, 298 U. S. 587, holding unconstitutional a New York statute authorizing the fixing of women's wages, the subsequent cases in this Court have given increasingly wider scope to the price-fixing powers of the states and of Congress.[5] *Tagg Bros.* v. *United States*, 280 U. S. 420, decided in 1930, upheld the power of the Secretary of Agriculture under the Packers and Stockyards Act to determine the just and reasonable charges of persons engaged in the business of buying and selling in interstate commerce livestock at a stockyard on a commission basis. In 1931 a New Jersey statute limiting commissions of agents of fire insurance companies was sustained by *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251. A New York statute authorizing the fixing of minimum and maximum retail prices for milk was upheld in 1934. *Nebbia* v. *New York*, 291 U. S. 502. And see *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163; *Borden's Farm Products Co., Inc.* v. *Ten Eyck*, 297 U. S. 251. Cf. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511;

[4] By stipulation filed in the state court it was agreed that the "sole and only issue for determination" was the constitutionality of the act "in so far as the same fixes or limits the fees or compensation of private employment agencies."

[5] But see New State Ice Co. v. Liebmann, 285 U. S. 262; Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, 192; Carter v. Carter Coal Co., 298 U. S. 238, 316.

Mayflower Farms, Inc. v. *Ten Eyck*, 297 U. S. 266. In 1937 *Adkins* v. *Children's Hospital*, 261 U. S. 525, was overruled and a statute of Washington which authorized the fixing of minimum wages for women and minors was sustained. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. In the same year *Townsend* v. *Yeomans*, 301 U. S. 441, upheld a Georgia statute fixing maximum warehouse charges for the handling and selling of leaf tobacco. Cf. *Mulford* v. *Smith*, 307 U. S. 38; *Currin* v. *Wallace*, 306 U. S. 1. The power of Congress under the commerce clause to authorize the fixing of minimum prices for milk was upheld in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, decided in 1939. The next year the price-fixing provisions of the Bituminous Coal Act of 1937 were sustained. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381. And at this term we upheld the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938. *United States* v. *F. W. Darby Lumber Co.*, 312 U. S. —. These cases represent more than scattered examples of constitutionally permissible price-fixing schemes. They represent in large measure a basic departure from the philosophy and approach of the majority in the *Ribnik* case. The standard there employed, following that used in *Tyson & Brother* v. *Banton*, 273 U. S. 418, 430 *et seq.*, was that the constitutional validity of price-fixing legislation, at least in absence of a so-called emergency,[6] was dependent on whether or not the business in question was "affected with a public interest". Cf. *Brazee* v. *Michigan*, 241 U. S. 340. It was said to be so affected if it had been "devoted to the public use" and if "an interest in effect" had been granted "to the public in that use". *Ribnik* v. *McBride*, *supra*, p. 355. That test, labelled by Mr. Justice Holmes in his dissent in the *Tyson* case (273 U. S. at p. 446) as "little more than a fiction", was discarded in *Nebbia* v. *New York*, *supra*, pp. 531-539. It was there stated that such criteria "are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices", and that the phrase "affected with a public interest" can mean "no more than that an industry, for adequate reason, is subject to control for the public good." *Id.*, p. 536. And see the dissenting opinion in *Ribnik* v. *McBride*, *supra*, at p. 359.

[6] Cf. Highland v. Russell Car & Snow Plow Co., 279 U. S. 253.

The *Ribnik* case, freed from the test which it employed, can no longer survive. But respondents maintain that the statute here in question is invalid for other reasons. They insist that special circumstances must be shown to support the validity of such drastic legislation as price-fixing, that the executive, technical and professional workers which respondents serve have not been shown to be in need of special protection from exploitation, that legislative limitation of maximum fees for employment agencies is certain to react unfavorably upon those members of the community for whom it is most difficult to obtain jobs, that the increasing competition of public employment agencies and of charitable, labor union and employer association employment agencies have curbed excessive fees by private agencies, and that there is nothing in this record to overcome the presumption as to the result of the operation of such competitive, economic forces. And in the latter connection respondents urge that since no circumstances are shown which curb competition between the private agencies and the other types of agencies, there are no conditions which the legislature might reasonably believe would redound to the public injury unless corrected by such legislation.

We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which "should be left where . . . it was left by the Constitution—to the States and to Congress." *Ribnik* v. *McBride, supra,* at p. 375, dissenting opinion. There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field. In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. *Tyson & Brother* v. *Banton, supra,* at p. 446; *Adkins* v. *Children's Hospital, supra,* at p. 570. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.

The judgment is reversed and the cause is remanded to the Supreme Court of Nebraska for proceedings not inconsistent with this opinion.

It is so ordered.